Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.

No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent New Jersey State Prison, Trenton Jersey and W. CARY EDWARDS JR., Attorney General of New Jersey,

Petitioners,

v.

DANA BRAUNSKILL,

Respondent.

On Writ Of *Certiorari* To The United States Court of Appeals For The Third Circuit

---

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Can the limited discretion to stay the enlargement of a prisoner who is granted a writ of habeas corpus conferred on federal courts by *Fed.R.App.P.* 23(c) be exercised on the basis of factors traditionally reserved to state courts that have no direct relation to the federal function in habeas cases?

Do principles of federalism and comity allow a federal court to make determinations regarding a defendant's dangerousness to the community that have always been regarded as being peculiarly within the authority of state courts to recognize and act upon?

Does a successful habeas applicant's status as an indicted but unconvicted defendant permit a federal court to stay his enlargement pending a state appeal in the absence of specific and unequivocal authorization in the language of Rule 23(c) or (d)?

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey in this matter is reported as *Braunskill* v. *Hilton*, 629 F.Supp. 511 (D.N.J. 1986), and is reproduced in the appendix to this brief at App. 1 through 26.

The opinion of the United States Court of Appeals for the Third Circuit, which has been published, is reproduced in the appendix to this brief at App. 27 through 36.

STATEMENT OF THE CASE

Respondent adopts the statement of the case contained in the petitioners' brief on the merits[1] with one exception. Respondent was not convicted of aggravated sexual assault as charged in the indictment. Rather, he was acquitted of aggravated sexual assault and convicted of the lesser offense of second-degree sexual assault. *N.J.S.A.* 2C:14-2c.

Respondent also wishes to add the following: Respondent was released on May 20, 1986. On December 2, 1986, the United States Court of Appeals for the Third Circuit affirmed the judgment of the district court granting the writ of habeas corpus. (App. 27-36) Petitioners' motion for rehearing was filed with the Circuit Court on or about December 15, 1986.

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[1] References to documents other than the Joint Appendix (JA) will adhere to the following form:

Pb = Petitioners' brief on the merits.

Ab = brief of *amicus curiae* the Solicitor General of the United States.

Tr = transcript of the hearing held before the district court on March 26, 1986.

App = Appendix to this brief.

SUMMARY OF ARGUMENT

1. In *Carter* v. *Rafferty*, 781 F.2d 993 (3rd Cir. 1986), the United States Court of Appeals for the Third Circuit held that the limited discretion under *Fed.R.App.P.* 23(c) to stay the enlargement of a prisoner who is granted a writ of habeas corpus can only be exercised if matters are put in issue relating to his or her ability to respond to federal process or that in some other respect relate to the federal interest in habeas proceedings. Petitioners assail this holding, arguing that the very existence of discretion necessarily implies the authority to stay a prisoner's enlargement based on state interests that have no direct bearing on the federal role in habeas proceedings, and, in particular, the authority to order a stay based on a prisoner's alleged dangerousness to the community and the chances of success of the state's appeal.

Petitioners' argument is unsupported by the language of Rule 23(c), its history and development, and caselaw in analogous situations, all of which lend credence to the holding in *Carter*, *supra*. The language and history of the rule and the rules of this Court from which it is derived allow only two undeniable conclusions: first, that there is a weighty presumption favoring the release of a prisoner who has been granted a writ of habeas corpus; and second, that the federal interest in assuring the prisoner's future response to federal process was strong enough to justify the requirement of a surety in appropriate cases. The only other basis for a temporary delay in the prisoner's enlargement explicitly recognized by contemporaneous authorities, including caselaw, was the "conditional writ," *i.e.*, a brief period between the time that a writ was granted and the time that it would take effect to allow the state to correct the constitutional error that rendered the prisoner's conviction violative of due process of law. No published case involving either Rule 23(c) or (d) or its predecessor rules has ever granted a stay of enlargement

beyond the "conditional writ" period based on factors that are not entirely consistent with the holding in *Carter, supra;* certainly, no stay has ever been granted based solely on the prisoner's alleged dangerousness to the community. Similarly, although federal bail law is not directly applicable to state prisoners in habeas proceedings, at the time that Rule 23(c) was adopted the only situations where bail was denied involved either the danger that the defendant would flee the jurisdiction or the protection of the orderly progress of the federal criminal justice process itself—factors having a "federal content" that are completely consistent with the *Carter* holding. Nor can the potentially unbridled discretion posited by petitioners be brought within the context of *Fed.R.App.P.* 8(a), which is completely unsuited to the unique circumstances of the normal habeas proceeding.

Petitioner's theory also is completely inconsistent with considerations of federalism and comity that have guided this Court's approach to habeas jurisprudence. The deference that this Court traditionally has shown to state courts and state court decisions has never been applied to the state's right to appeal as an adversary party in a habeas proceeding and has never taken the form of allowing federal courts to enforce state law or state policy themselves. Instead, the underlying principles that have motivated this Court's approach to federalism have been to give states the opportunity to vindicate their legitimate interests in their own court systems and to respect determinations that are recognized as being within the exclusive province of state courts to make. The teaching of *Carter, supra,* that some decisions are peculiarly within the authority of state court systems to recognize and act upon is particularly appropriate when applied to the question of pre-trial detention of unconvicted defendants (including habeas releasees) because this is an area in which there is no consensus among the state and federal

jurisdictions themselves. As such, the *Carter* holding is far more consistent with federalism and comity concerns than petitioners' theory, which when applied to states such as New Jersey amounts to a plea for protection of law enforcement authorities from the laws of their own state. Furthermore, even if petitioners' right to appeal from the grant of writ of habeas corpus is entitled to a measure of respect, the "Hobson's choice" that they claim threatens that right simply does not exist. The issue of whether or not a prisoner will remain in custody ordinarily will not affect the state's strategic decision regarding whether to proceed with an appeal or forego the appeal in favor of a retrial. Even if it did, since the question of custody in either situation will appropriately be governed by reference to state law governing pre-trial indictees, the decision in *Carter* does not pose a threat to petitioners' interests.

Petitioners' contention that granting a stay of enlargement is a permissible "continuation of punishment" flies in the face of a successful habeas applicant's legal status as an indicted but unconvicted defendant. By granting a writ of habeas corpus, a federal court of competent jurisdiction has determined that a prisoner's conviction was obtained in violation of fundamental due process of law and, as such, is null and void for all intents and purposes. To suggest otherwise denies the very basis of the Great Writ as it has developed through history. The fact that the granting of the writ may be reversed on appeal does not mean that it is any less final while the appeal is pending and certainly does not provide a reason *per se* for a stay of the district court's judgment. "Continuation of punishment" is the antithesis of a valid reason for detention of a defendant in this legal position. Petitioners' reliance on cases that justify detention of defendants on dangerousness grounds on a basis other than punishment is misplaced because these cases involve either defendants who are subject to a legally valid conviction and/or deten-

tion pursuant to a state statute that, unlike Rule 23(c), unequivocally permits and provides meaningful procedural safeguards that guide judicial determinations of dangerousness. In any event, the constitutionality of such statutes is far from clear at this time.

2. *Certiorari* should be dismissed as improvidently granted in this case because it is not an appropriate vehicle for the discussion or resolution of the conflict between petitioners' construction of Rule 23(c) and that put forth in *Carter, supra*. The record below clearly discloses that if the *Carter* holding was rejected and this case was remanded, there is no reasonable possibility that petitioners can carry their burden of showing either that respondent is a danger to the community or that they are likely to obtain a reversal of the district court's order granting the writ. Furthermore, there is a distinct possibility that this Court will deny any petition for a writ of *certiorari* concerning the Third Circuit's affirmance of the granting of the writ before the instant matter is decided. If this eventuality occurs, then this Court must dismiss this matter as moot because the "capable of repetition yet evading review" doctrine does not apply to an issue that only will be important in the future in cases arising between petitioners and other prisoners not parties to this case.

LEGAL ARGUMENT

POINT I

LIMITATION OF THE SCOPE OF A FEDERAL COURT'S DISCRETION IN STAYING THE ENLARGEMENT OF A PRISONER WHO HAS BEEN GRANTED A WRIT OF HABEAS CORPUS TO THOSE FACTORS WHICH BEAR DIRECTLY ON THE FEDERAL FUNCTION IN HABEAS CASES IS ABSOLUTELY NECESSARY FOR THE MAINTENANCE OF AN APPROPRIATE BALANCE OF POWER BETWEEN THE STATE AND FEDERAL JURISDICTIONS.

Fed. R. App. P. 23(c) states in pertinent part that pending review of the granting of a writ of habeas corpus,

the victorious prisoner "shall be released upon [his or her] recognizance, with or without surety, unless" the federal court having jurisdiction of the case at the time of the motion for a stay "shall otherwise order." Rule 23(d) states that an initial order respecting custody or enlargement entered pursuant either to Rule 23(b) or 23(c) shall remain in force throughout the appellate process unless an appellate court or judge or justice shall modify it or enter an independent order "respecting custody, enlargement or surety" for "special reasons." Contrary to petitioners' suggestion (Pb 35-36), neither the ruling of the United States Court of Appeals for the Third Circuit in *Carter* v. *Rafferty*, 781 F.2d 993 (3rd Cir. 1986), nor respondent's position in this Court can be oversimplified into a bald claim that granting a stay of enlargement of a victorious habeas defendant for any reason whatsoever is *per se* fundamentally unfair or a violation of due process. Instead, the task that the *Carter* court set for itself was to interpret the limited discretion to stay enlargement afforded by Rules 23(c) and (d) by reference to factors that "have . . . relevance to the federal function in habeas cases." *Id.* at 997. The basic teaching of *Carter* is that the only grounds for denying enlargement of a prevailing habeas defendant "would have to relate to a federal rather than a state interest," *Id.* at 998 n. 6, or have some "federal content" on a par with the acknowledged "strong interest in assuring the appearance of the [defendant] in subsequent proceedings. . . ," *Id.* at 995, 997. Dangerousness to the community was not such a federal interest because it "is a matter traditionally reserved to the state authorities to decide" that "can only be made by the state in accordance with state procedures." *Id.* at 996.

The *Carter* approach has many elements that should recommend themselves to this Court. First, the very effort to distinguish factors with "federal content" from those that are the traditional concerns of state courts is consistent with the emphasis on principles of federalism

and comity that has been a highlight of this Court's approach to habeas cases in general. *Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977). It also bespeaks recognition of this Court's belief that the scope of federal authority in habeas cases "is sometimes as much a matter of allocation as it is of analysis" and that "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. ____, 106 S.Ct. 445, 452 (1985). Second, the holding that "the 'special reasons' to which Rule 23(d) refers must, *at the very least*, embrace those matters which are related to an assurance that the petitioner will appear in response to federal court orders," *Carter, supra* at 995 (emphasis added), is by its own terms not exclusive; indeed, the court went on to hold that factors such as dangerousness to the community could be considered if they related "to a petitioner's ability to respond to federal process,[2] or which in some other

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[2] Although petitioners mention both dangerousness to the community and likelihood of success on appeal as the factors that they would like a federal court to consider pursuant to Rule 23(c), they make no secret of the fact that they are "especially" interested in the dangerousness factor (Pb 30). The focus on the dangerousness factor is appropriate for any discussion of *Carter* if for no other reason than in that case the prosecutor never offered (and, therefore, the court never discussed) likelihood of success on appeal as a reason for staying the prisoner's enlargement. By necessity, then, respondents' brief will, where appropriate, focus on dangerousness when discussing the specific "state interests" that petitioners wish to have federal courts "vindicate" or enforce. Respondent does not concede, of course, that "likelihood of success" is *per se* a factor that would justify a stay of enlargement. However, it is significant to note that this factor is not squarely inconsistent with *Carter* because common sense would dictate that likelihood of success by the state on appeal would have a direct bearing on the "strong interest in assuring the appearance of [the defendant] in subsequent proceedings . . ." *Id.* at 995. It stands to reason that a prisoner who prevails in the habeas proceeding in district court who [unlike respondent] faces a lengthy

respect relate to the federal interest," *Id.* at 996-997. Finally, the opinion correctly points out that its ruling "does not leave the state without recourse" to resort to its own courts for vindication or enforcement of traditional state concerns.

The position of both the petitioners and the Solicitor General is that the very fact that Rule 23(c) and (d) invests federal courts with discretion to grant a stay of enlargement requires that the *Carter* court's reasoned and painstaking attempt to confine the "sparse" wording of Rule 23(c) and (d) to considerations that have clear federal content and leave other factors of purely state interest to the courts best able to apply them must be disregarded. Instead, petitioners ask that the rules be read to entrust federal courts "with the discretion to consider all factors which have an impact on the decision to immediately release a state prisoner" (Pb 21), regardless of whether or not those factors have anything directly to do with the federal role in the habeas context. Respondent submits that neither the wording and history of the rule nor the cases that have construed it up to now support such an open-ended and potentially boundless interpretation of the scope of the federal court's discretion. More significantly, it is contended that approval of the teachings of *Carter* by this Court is mandatory if the scope of the discretion allowed by Rule 23(c) and (d) is to be kept within bounds appropriate to the system of concurrent but separate powers of federal and state courts that gives life to "federalism and comity."

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sentence if the state prevails on appeal might be strongly tempted to flee the jurisdiction before the appeal has run its course. As noted later in this brief, this common sense connection between the merits of an appeal or retrial and the possibility of flight by a defendant traditionally has formed the basis for denial of bail in capital cases where "proof is evident and the presumption is great."

A. Neither The Wording Nor The Historical Development Of Rule 23(c) Support A Construction That Would Permit Federal Courts To Consider Or Rely Upon State Interests Not Directly Related To The Essential Purposes Of Habeas Corpus Proceedings As A Basis For Staying A Victorious Prisoner's Enlargement.

Petitioners repeatedly assail the *Carter* holding as "impractical," "dangerous," and at odds with "common practice." Yet it is petitioners who actually fail to pay heed to the clear intent of the rule in question and who misconstrue the detailed historical and legal analysis relied on by the Third Circuit. By far the most important precedent from which *Carter* draws support is *United States ex rel. Thomas* v. *New Jersey*, 472 F.2d 735 (3rd Cir. 1973), *cert.* den. 414 U.S. 878 (1973), which contains a thorough and often-relied-upon history of Rule 23(c) and (d). As noted in that opinion, release of successful habeas petitioners was mandatory until 1967. At that time limited discretion was given to the federal courts in Rule 49 (now Rule 41) of this Court and, very shortly thereafter, in Rule 23(c) and (d):

> But it is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody. The 1967 change was not intended to adopt a general rule in favor of custody pending appeal, but only to substitute discretion, to be exercised in limited situations, for what was formerly a mandatory release requirement.

Id. at 743.

Another change made in the Rule was the deletion of the phrase "for appearance to answer the judgment of the appellate court." However, as *Thomas* pointed out, "no change in substance was intended"; the federal court is still "naturally interested in the availability of the petitioner to respond to its judgment." *Id.* See also *LaFrance*

v. *Bohlinger*, 487 F.2d 506, 508 (1st Cir. 1973), *cert.* den. 419 U.S. 1080 (1974). It was this strong interest that formed the basis of the *Carter* opinion.

Unquestionably, the most significant facet of Rule 23 (c) is the weighty presumption in favor of releasing the defendant once a district court has granted a writ of habeas corpus—that the "prisoner *shall* be enlarged upon [his or her] recognizance" (emphasis added). *Carter*, *supra* at 994; *Thomas*, *supra* at 743; *United States ex. rel. Barnwell* v. *Rundle*, 461 F.2d 768, 770 (3rd Cir. 1972). The "shall" command is an accurate reflection of the very nature of the habeas remedy itself. "Discharge of conviction through habeas corpus is not an act of judicial clemency but a protection against illegal custody." *Brown* v. *Allen*, 344 U.S. 443, 465 (1953). Although contemporary habeas corpus proceedings serve as vehicles for the resolution of a variety of constitutional issues, the essence of habeas corpus is an attack by a person in custody on the legality of that custody, and the traditional function of the writ is to secure release from illegal custody. *Preiser* v. *Rodriguez*, 411 U.S. 475, 484-485 (1973); *Fay* v. *Noia*, 372 U.S. 391, 399 n.5 (1963); *Jago* v. *United States District Court, Northern District of Ohio, Eastern Division at Cleveland*, 570 F.2d 618, 620 (6th Cir. 1978). Thus every day that a prisoner continues to be incarcerated is another day that the State has deprived him of his liberty without due process of law. Since the presumption incorporated in Rule 23 (c) derives from the "core" or "heart" of habeas itself, *Preiser* v. *Rodriguez*, *supra* at 487, it follows that factors tending to overcome that presumption should be related to the basic rationale for federal jurisdiction in this area.

Contemporaneous authority construing Rule 23 (c) and Rule 49.3. (now 41.3) of this Court is quite as "sparse" as the wording of the rules themselves. What does exist, however, does not support petitioners' and the Solicitor

General's claim that the drafters of these rules meant to have federal courts exercise unbridled discretion to deny enlargement based on any "relevant" factor. B. Boskey and E. Gressman, "The 1967, Changes in the Supreme Court's Rules," 42 F.R.D. 139, 161 (1967), states that the rule gives a measure of discretion "when this seems desirable. . ."; however, the examples that are used to give content to this observation simply do not represent the "broad discretion" that the Solicitor General (Ab 10-11) and petitioners argue for. The article states that discretion "might be exercised in cases where officials responsible for the prisoner's detention have been allowed a period within which to retry him or otherwise to cure procedural defects rending the confinement illegal. . ." This particular exercise of discretion, however, does not relate to appellate review of the granting of the writ at all; instead, it represents a shorthand description of the practice of granting "conditional writs" pursuant to 28 U.S.C. § 2243, *i.e.*, an order specifying that the writ will not take effect (*i.e.*, the prisoner's custody need not be terminated) until the passage of a brief period during which the State has an opportunity to rectify the violation of due process that rendered the prisoner's conviction or sentence fundamentally unfair. *Rogers* v. *Richmond*, 365 U.S. 534, 549 (1961); *Mahler* v. *Edby*, 264 U.S. 32, 45-46 (1924); *Byrd* v. *Smith*, 407 F.2d 363, 366 (5th Cir. 1969). As petitioners themselves point out (Pb 26-27), if the State responds to the terms of the conditional writ, any stay of enlargement pending the State's appeal would be moot. Nor can the article's reference to a prisoner's "physical or mental condition" readily be equated with the dangerousness factor that petitioners emphasize. (Pb 20) Instead, the phrase connotes situations in which medical considerations peculiar to the prisoner make complete release from custody either contrary to his or her best interests, see *Johnston* v. *Marsh*, 227 F.2d 528, 529 (3rd Cir. 1955) (prisoner

admitted to bail pending determination of his petition conditioned "upon his going to and remaining in a private hospital"), *Woodcock* v. *Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972), or, perhaps, might be in violation of a federal statute. See 18 U.S.C. § 4246(g), as discussed in *Carter*, *supra* at 996.

Petitioners make much of the fact that in *Carter*, *supra* at 997 n.5, the court acknowledged its disagreement with other decisions that "have held that more general 'bail' standards may be considered by a court in regard to the release of a prevailing habeas petitioner." Such an acknowledgment, however, does not imply that a real conflict between the circuits exists because the disagreement reflects a mere inconsistency in *dicta* regarding the general principles applicable to such cases; the results of the cases themselves can easily be reconciled with the holding in *Carter*. In *Walberg* v. *Israel*, 776 F.2d 134 (7th Cir. 1985), *cert.* den. ___ U.S. ___, 106 S.Ct. 546 (1986), for instance, the circuit court reversed the district court's denial of the habeas petition but stayed its mandate pending the disposition of the State's petition in this Court. Since the circuit court had not ordered petitioner's unconditional release to start with, it could not even decide "whether Rule 23(b) or Rule 23(c) applies." *Id.* at 136. The *dicta* regarding the presumption in Rule 23(c) that petitioners rely on (Pb 123), like the Boskey and Gressman example, does not refer to appellate review of the granting of the writ. Instead, the emphasis on "the error in [the prisoner's] existing incarceration being readily curable" because the state can "retry, reconvict, and reimprison" him clearly describes the nature of the conditional writ itself rather than the process of an appeal. *Id.* at 136. In any event, the result of the case turned not nearly so much on the court's construction of Rule 23(c) in *dicta* as it did on the fact that the prisoner had already offered to plead guilty to the very charge for which his conviction was

found to be unconstitutional, thus ensuring that he would "remain in prison for at least as long as the Supreme Court takes to act on the state's petition for certiorari . . ." *Id.* See also *United States ex rel. Rice* v. *Vincent*, 486 F.2d 215, 216 (2nd Cir. 1973); *Grigsby* v. *Mabry*, 583 F.Supp. 629, 631-632 (E.D. Arkansas 1983), modified on other grounds, 758 F.2d 226 (8th Cir. 1985), rev'd on other grounds *sub nom. Lockhart* v. *McCree*, ___ U.S. ___, 106 S.Ct. 1758 (1986). The court's recognition that the prisoner would remain in jail regardless of its own action hardly amounts to a true conflict with the *Carter* holding that questions of dangerousness are more properly a concern of state courts rather than federal habeas courts.

The holding in *Lewis* v. *Henderson*, 356 F.2d 105 (6th Cir. 1966) presents even less of a real conflict with *Carter*. Firstly, it is a 20-year-old pre-Rule 23 opinion that does not even purport to construe the rules of this Court that existed at that time; instead, it considered the motion only under its own local court rule. *Id.* at 105. Secondly, and more importantly, that case did not even recognize the presumption of release of a successful habeas petitioner; instead, it relied on an even older case for the proposition that as a matter of policy, "it is by no means clear that as a matter of right and routine a state prisoner should be set at large pending [the State's appeal]." *Id.* at 106. As such, the *Lewis* decision clearly has been discredited by more recent cases construing Rule 23(c) and has lost all weight as authority. See *Thomas*, *supra* at 743 n.7; *Cagle* v. *Davis*, 520 F.Supp. 297 (E.D. Tenn. 1980), aff'd 663 F.2d 1070 (6th Cir. 1981). In any event, the reason that enlargement was stayed in *Lewis*, *supra* at 106, was because defendant faced trial (and presumably was being held) on a separate charge of attempted murder of a police officer. It is disingenuous to argue that reliance on such a factor presents a conflict with the emphasis on a petitioner's readiness to respond to federal process stressed in *Carter*.

Treatment of Rule 23(c) applications by federal district courts does not reflect widespread reliance on state-oriented "bail-type considerations." It is important to note that in none of the district court cases cited in the petitioners' brief (Pb 23) was the prisoner's enlargement stayed or revoked; at worst, the factors considered by those courts led them to condition enlargement on the posting of a surety sufficient to ensure petitioner's availability to federal process.[3] See *United States ex rel. Taylor* v. *Redman*, 500 F.Supp. 453, 460 (D. Del. 1980); *Sellars* v. *Estelle*, 450 F.Supp. 1262, 1265 (S.D. Texas 1978); *Hill* v. *Rose*, 579 F.Supp. 1080, 1090 (M.D. Tenn. 1983); *Cagle* v. *Davis*, *supra* at 312-313. Nor can "recognition . . . that courts do consider a wide range of state concerns" legitimately be extracted from court orders that petitioners themselves admit are "issued without reasoned discussion" beyond a brief mention of the fact that the State may file an appeal (Pb 31).

Petitioners opine that the *Carter* opinion's construction of Rule 23(c) is erroneous because that rule should be read in light of Rule 23(b) and (d). (Pb 22) To the contrary, Rule 23(b) is not even cited in the *Carter* opinion. That omission is understandable—Rule 23(b) deals with an entirely different legal situation and embodies entirely different

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[3] Contrary to petitioners' suggestion (Pb 23-24 n.3), the rejection of a stay of enlargement in favor of a "bond to keep the peace," *Sellers* v. *United States*, 89 S.Ct. 36, 39 (1968) (Black, J., Circuit Justice), is neither "inconsistent" with Rule 23 nor an example of "confusion" regarding the scope of habeas relief. This form of conditional bail release is a common form of practice in a variety of jurisdictions. See B. Gottlieb, "Public Danger as a Factor in Pretrial Release: A Comparative analysis of State Laws," National Institute of Justice, pp. 7-9. It was also a permissible option under the 1966 Bail Reform Act (18 U.S.C. § 3146(a), (b); 80 State. 214) and apparently would be allowed under current federal bail provisions. 18 U.S.C. § 3142(c)(1), (2)(N).

legal standards. It covers unsuccessful petitioners whose State convictions remain valid. Under those circumstances, continued incarceration is up to the discretion of the court.[4] *Aronson* v. *May*, 85 S.Ct. 3, 5 (1964) (Douglas, J.); *Petition of Johnson*, 72 S.Ct. 1058, 1061 (1952) (Douglas, J.); *Ostrer* v. *United States*, 584 F.2d 594, 599 (2nd Cir. 1978). The drafters of Rule 23 certainly understood this distinction and made release presumptive only in Rule 23(c) cases. Rule 23(d), which is nothing more than a rule allowing appellate review of district court orders, also should reflect what is, in essence, the widely-accepted difference between a defendant who has yet to be given a fair trial and one who is subject to a valid conviction that has not yet been tested on appeal. Compare, for instance, *N.J. Court R.* 3:26-1(a) to *N.J. Court R.* 2:9-4. If Rule 23(d) has any independent significance at all, it would arise from the support it lends to the conclusion in *Thomas*, 472 F.2d at 743, that "no change in substance was intended" when Rule 23(c) was adopted. The "special reasons" component of Rule 23(d) was not the invention of the drafters of then-Rule 49.4 of this Court; instead, it was derived from the predecessor Rule 34.3, which stated that when a prisoner obtained a writ of habeas corpus he "shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, *except where, for special reasons, sureties ought not to be required.*" (117 U.S. 708, emphasis added). The close connection between "special reasons" and the posting of sureties tends to support rather than undercut the

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[4] A similar distinction separates prisoners who succeed in obtaining a writ of habeas corpus from a third category of applicants—those who apply for release pending the disposition of their petitions for habeas relief. *Johnston* v. *Marsh*, 227 F.2d at 532 (Hastie, C.J., concurring); *Cherek* v. *United States*, 767 F.2d 335, 337 (7th Cir. 1985); *Iuteri* v. *Nardoza*, 662 F.2d 159, 161 (2nd Cir. 1981); *In re Wainwright*, 518 F.2d 173 (5th Cir. 1975).

emphasis on the federal interest in assuring the prisoner's appearance stressed in *Carter, supra* at 995.

Perhaps sensing that their interpretation of Rule 23(c) would invest federal judges with potentially unbounded discretion, both petitioners and the Solicitor General argue that the rule should be "harmonized" with Rule 8(a) of the Federal Rules of Civil Procedure (Pb 32-33; Ab 11-12). Yet in no case has a stay of enlargement been granted because the standards relevant to Rule 8(a) have been engrafted onto Rule 23(c) or (d). In *Hill* v. *Rose, supra*, the case relied on by petitioner, the district court initially considered the question of releasing the petitioner by relying on Rule 8(a). However, in its supplemental opinion, the court decided the issue by relying on Rule 23(c), stating: "The release of a prisoner pending review of a decision ordering his or her release by writ of *habeas corpus* is governed specifically by Rule 23(c), Fed. R. App. P." 579 F.Supp. at 1091. In fact, in a footnote in the opinion, the district court expressed some irritation at the fact that this action was brought under the wrong rule. *Id.* See also, *King* v. *Zimmerman*, 632 F.Supp. 271, 278 (E.D. Pa. 1986).

Prior decisions of this Court that discuss how or whether the Federal Rules of Civil Procedure "harmonize" with habeas practice cast doubt on the propriety of petitioners' attempt to link Rule 23(c) with Rule 8(a). In *Harris* v. *Nelson*, 394 U.S. 286, 294 (1969), this Court stated that habeas practice "is unique. [It] has conformed with civil practice only in a general sense." See also *Jago*, 570 F.2d at 620. Although federal courts may "fashion appropriate modes of procedure by analogy to existing rules . . . ," *Harris, supra* at 299, this has only been done when no other statute or habeas-specific rule is addressed to the subject, *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257, 270 (1978), and, even then, only when the rule applied is "noncontroversial." *Harris, supra* at 294 n.5. Consistent with these holdings,

the only instances in which federal courts have used Rule 8(a) to guide them in connection with Rule 23(c) or (d) proceedings concerned the question of whether motions for stays of enlargement must first be brought in the district or the circuit court. *Barnwell*, 461 F.2d at 769; *Walberg*, 776 F.2d at 135.

The nature of a habeas proceeding and the remedy it provides also give substance to this Court's belief that "specific provisions [of the civil rules] are ill-suited to the special problems and character of such proceedings." *Harris*, 394 U.S. at 296. Although habeas proceedings are characterized as "civil" for pleading purposes, "the label is gross and inexact" because "it is in such proceedings that a person in custody charges that . . . he is deprived of his freedom contrary to law."[5] *Id.* at 292-294. Such a proceeding cannot legitimately be compared with the usual civil case involving injunctions or money judgments that Rule 8(a) and (b) are designed to address. See, for instance, *United States ex. rel. Calhoun* v. *Pate*, 341 F.2d 885, 887 (7th Cir. 1965), *cert.* denied 382 U.S. 945 (1965) (inapplicability of "supersedeas bond" provisions of Rule 8 to habeas cases). Rule 8(c) itself lends support to this distinction by designating *F.R.Cr.P.* 38(a) as the exclusive source of authority for stays in criminal cases. The provisions of Rule 23(c) and (d) should be accorded similar exclusivity in habeas cases.[6]

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[5] *Grigsby* v. *Mabry*, 583 F.Supp. at 631-632, which petitioner relies on (Pb 32 n. 7), does not conflict with this holding because the opinion made it clear that since that was a capital case the defendant was not deprived "of any legally cognizable interest to be released on bond" since Arkansas law dictated that his offense was non-bailable. See also *Rice* v. *Vincent*, 486 F.2d at 216, where the defendant was under sentence for a separate murder charge.

[6] Petitioners' attempt to create a similar analogy between habeas proceedings and criminal practice by invoking the Bail Reform Act of 1984 (Pb 30-31) cannot be countenanced in the face of apparent

Support for Petitioners' open-ended and unbridled view of the scope of a federal court's discretion under Rule 23(c) and (d), then, cannot fairly be derived from the wording of the rules themselves, their contemporaneous history, or the development of caselaw since their adoption. Nor does reference to supposedly analogous federal bail provisions strengthen petitioners' arguments (see note 6, *supra*). Indeed, if the historical development of federal bail provisions informs the analysis of Rule 23 at all, it does so by strengthening the sharply-focused approach set forth in *Carter*, *supra*, rather than petitioners' theory.

Both Rule 23 and Rule 49 (now Rule 41) of this Court were adopted in 1967. At that time federal bail policy was governed by the Bail Reform Act of 1966 (18 U.S.C. § 3146; 80 Stat. 214). Consistent with this Court's holding in *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951), the main premise of that law was that in non-capital cases a person should be ordered released under minimal conditions reasonably required to do no more than assure his presence at judicial proceedings. No jurisdiction, state or federal, allowed preventive detention of unconvicted, non-capital defendants on grounds of dangerousness to the community until 1970, when the District of Columbia Court Reform and Criminal Procedure Act was passed (D.C. Code Ann.

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congressional intent to the contrary. When that Act was passed, *Fed.R.Cr.P.* 46 and *Fed.R.App.P.* 9(c) were amended to conform to its changes. Pub. L. No. 98-473, c. 207, §§ 209, 210 (Oct. 12, 1984). No similar amendment was passed for Rule 23 or Rule 41 of this Court, notwithstanding the Solicitor General's suggestion that those rules at least should be read to apply to federal prisoners seeking release under 28 U.S.C. § 2255. (Ab 13-17) Also, *Carter*, *supra* at 995, is only the latest in an unbroken line of cases that hold that federal satutory bail standards do not govern release of prisoners in habeas proceedings. See *Thomas*, 472 F.2d at 741; *Cherek*, 767 F.2d at 337; *Woodcock* v. *Donnelly*, 470 F.2d 93 at 94; *United States* v. *Dansker*, 561 F.2d 485, 486-87 (3rd Cir. 1977); *Hill* v. *Rose*, 579 F.Supp. at 1091.

§ 23-1322; 84 Stat. 570). Acceptance of petitioners' open-ended construction of Rule 23(c) by this Court, then, would be tantamount to holding that in adopting this rule, Congress intended to give federal judges in habeas cases more power to order confinement of prisoners who successfully obtained relief than was given to any other judge by any other jurisdiction in the context of bail orders for similarly situated pre-trial indictees (see Point IC, *infra*). Congress cannot possibly have intended to create such an anomalous result.

Prior to the adoption of the Bail Reform Act of 1984, federal law recognized only two situations in which bail could be denied pending trial. Both of these situations, however, represent "a 'special reason' having federal content" within the meaning of *Carter, supra* at 997. The first was the traditional exception for capital cases where "the proof is evident or the presumption great." The weight of scholarly authority, however, supports the view that denial of bail in capital cases "stemmed from concern that the defendant would flee to avoid any possibility of any death penalty and not concern that his pretrial release posed a danger to the community." *United States* v. *Melendez-Carrion*, 790 F.2d 984, 998 (2nd Cir. 1986). Simple common sense also compels recognition of the view that "few men facing the death penalty can be trusted to appear for trial." L. Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," 56 *Va.L.Rev.* 371, 377 (1970). The second situation was where bail was denied because the defendant "posed a threat to the safety and security of witnesses, *thereby hampering the operation of the court*." *United States* v. *Bigelow*,[7] 544

[7] In one case of this type, *United States* v. *Wind*, 527 F.2d 672, 675 (6th Cir. 1975), the court made a passing reference to "danger to the community" in affirming the denial of bail. The Sixth Circuit's subsequent opinion in *Bigelow*, however, made it clear that that court accepted the traditional notion that denial of bail in this situation was incident to the federal courts' responsibility to insure the integrity of the criminal justice process.

F.2d 904, 907-08 (6th Cir. 1976) (emphasis added). Case law in this area uniformly makes it clear, however, that the concern was not with a defendant's dangerousness to the community but, rather, with the "necessity of providing for the orderly progress of a criminal prosecution," *Carbo* v. *United States*, 82 S.Ct. 662, 668 (1962) (Douglas, J., Circuit Judge)—a concern having "federal content" that certainly could be cognizable under *Carter, supra*.[8] See also *United States* v. *Leisure*, 710 F.2d 422, 426 (8th Cir. 1983); *United States* v. *Graewe*, 689 F.2d 54, 57 (6th Cir. 1982); *United States* v. *Provenzano*, 578 F.Supp. 119, 120 (E.D. La. 1983), aff'd 747 F.2d 1462 (5th Cir. 1983).

In summary, respondent asserts that nothing in the language of Rule 23(c) itself, its historical antecedents, or the caselaw that construes it or even is relevant to it supports petitioners' claim that the discretion afforded to federal judges under this rule is so broad as to encompass any conceivable factor, regardless of whether or not it has federal content. Nothing in the rule itself or its history and development cast the slightest doubt on the holding in *Carter, supra* at 997, that any factor cognizable under Rule 23(c) must have "relevance to the federal function in habeas cases" and, in particular, those "which bear on guaranteeing the future presence of the petitioner. . . ."

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[8] Refusing to allow enlargement of a prisoner who obtains habeas relief because of a perceived threat to witnesses in a *state* court hearing would not be a permissible factor under Rule 23(c), however, because protection of the integrity of state court proceedings must be viewed as an area that best can be handled by the State courts, which are assumed to be able to adequately protect their own interests. *Carter, supra* at 996. See Point IB, *infra*.

B. Principles Of Federalism And Comity Require That Discretion To Stay Enlargement Of A Prisoner Pursuant To Rule 23(c) Be Limited To Factors That Are Central To The Federal Role In Habeas Proceedings And Not Include Matters That Are Traditionally Reserved To State Authorities To Decide.

In Point IB of their brief, petitioners attempt to buttress their interpretation of Rule 23(c) by invocation of the "panoply of significant state interests that this Court has suggested must be weighed" when the federal courts consider habeas applications (Pb 24). They argue that their right to appeal the judgment granting respondent a writ of habeas corpus might be "extinguished" because in order "possibly" to avoid releasing respondent or other successful habeas applicants "even though [they] may have posed a danger to the community and the state likely would prevail on appeal" they would have to initiate retrial proceedings before the writ became final, thus rendering their appeal moot (Pb 25 to Pb 27). They further claim that protection of a right to appeal that is not "diminished" by concerns regarding whether or not prisoners will remain in custody is part of the "deference for state courts" that has been a recurrent theme in this Court's treatment of habeas cases (Pb 28-29). Respondent submits, however, that acceptance of petitioners' theory would subvert rather than further the interests of federalism and comity to which this Court has always been sensitive. Rather than allow federal courts to refrain from interfering with matters traditionally and properly reserved for action by states themselves, petitioners' construction of Rule 23(c) would require federal courts to make decisions that would, in effect, supplant state criminal justice processes—indeed, would require federal courts to make judgments that would be contrary to the constitutional and statutory law of over half of the very states whose "vital interests" petitioners purport to defend. Furthermore, petitioners' construction of the rule is based on a

"Hobson's choice" that either does not exist or has nothing to do with whether or not a victorious prisoner remains in custody after a writ of habeas corpus is granted. Simply stated, whether or not the State appeals or decides to retry the prisoner ordinarily will not determine whether or not that supposedly dangerous prisoner remains in custody pending completion of whichever course the State chooses.

Respondent, of course, has no quarrel with petitioners' assertion that this Court's habeas decisions are marked by "deference for state courts" and "state court decisions" (Pb 28). Respondent vigorously disagrees, however, that this Court's deference to principles of federalism and comity takes the form of allowing federal courts to "vindicate" state interests by enforcing state law policies themselves. Instead, the common denominators of this Court's approach to federalism have been to give state governments the opportunity and authority to vindicate their "vital interests" in their *own* court systems and to require federal courts to refrain from making decisions that either have been made or best can be made under state law.

Although this Court's decisions regarding the respect due to concepts of federalism and comity in habeas litigation cannot be divided into airtight analytical compartments, three broadly-defined categories can be discerned. The first is this Court's insistence that whenever possible, state courts should be resorted to in the first instance for the vindication of constitutional rights and liberties. The most venerable example of this category of cases is the exhaustion doctrine, which requires as a matter of comity that federal courts should not consider a claim in a habeas petition until after the state courts have had an opportunity to act on it. This doctrine was first enunciated in *Ex parte Royall*, 117 U.S. 241, 251 (1886), in which this Court ruled "that the public good requires that those relations

[between state and federal courts] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." In *Rose* v. *Lundy*, 455 U.S. 509, 514 (1982), this Court adopted a "total exhaustion" rule for issues raised in habeas corpus petitions "because it gives the state courts the first opportunity to correct federal constitutional errors and minimize federal interference and disruption of state judicial proceedings." Closely related is the doctrine of "procedural default," which requires federal courts to refuse to consider habeas petitions when exhaustion of constitutional claims in state courts has not occurred because the prisoner has failed to raise them in the manner required by state procedural rules. *Wainwright* v. *Sykes*, 433 U.S. at 87. This doctrine was deemed necessary because the "costs" of such a default are "particularly high" given the fact that "the trial court has had no opportunity to correct the [constitutional] defect" and the "state appellate courts have not had a chance to mend their own fences and avoid federal intrusion." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). See also *Murray* v. *Carrier*, 477 U.S. ___, 106 S.Ct. 2644, 2647 (1986); *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d 435, 441-442 (3rd Cir. 1982). It is significant that the "procedural default" doctrine does not require federal courts to "vindicate" or enforce state procedural rules simply because those rules exist; rather, the deference allowed to state courts to make their own decisions on how and when a constitutional claim will be raised is so great that federal courts will entertain any claim that was exhausted in the state courts even if those courts could have chosen to bar consideration of it. *Engle*, 456 U.S. at 135 n.44; *County Court of Ulster* v. *Allen*, 442 U.S. 140, 154 (1979); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975).

The second category is deference that federal courts give to actions taken on decisions made by state courts

that fall squarely within the realm of state law. The foremost example of this category is the doctrine of abstention, which requires federal courts to stay their hand when granting relief would interfere with ongoing state criminal proceedings. This doctrine was fashioned so that "full play would be allowed the States in the administration of their criminal justice without prejudice to federal rights enwoven in state proceedings." *Fay* v. *Noia*, 372 U.S. 391, 419 (1963). Another example is this Court's enforcement of 28 U.S.C. § 2254(d), which requires that a presumption of correctness be given to a state court's determination of a factual issue. This Court has construed this statute strictly in order "to minimize that inevitable friction [between state and federal courts in habeas proceedings]." *Sumner* v. *Mata*, 449 U.S. 539, 550 (1981). Although not peculiar to habeas cases, the "adequate and independent state ground" doctrine falls into this category because it renders a state decision resting on an adequate foundation of state substantive or procedural law immune from federal court review. *Wainwright* v. *Sykes*, 433 U.S. at 81. The reason for this limitation on federal appellate review "is found in the partitioning of power between the state and federal judicial systems. . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

The third category is the deference that federal courts have shown to state courts to fashion their own remedies for the correction of constitutional violations that have led to the granting of writs of habeas corpus. The very reason for the granting of a conditional writ is that federal courts can only adjudge whether or not constitutional rights have been violated in such a way as to render a prisoner's conviction and confinement unconstitutional. This power does not extend so far as to allow a federal court to dictate the manner by which a state must correct the constitu-

tional infirmity. *Cabana* v. *Bullock*, 474 U.S. ___, 106 S.Ct. 689 (1986); *Irvin* v. *Dowd*, 366 U.S. 717, 728-729 (1961); *Magwood* v. *Smith*, 791 F.2d 1438, 1450 (11th Cir. 1986). See also *Thomas*, 472 F.2d at 743-744; *Jago*, 570 F.2d at 623.

The common thread that binds the various categories of concern for interests of federalism and comity together is clear—the notion that the power possessed by federal courts in habeas matters should not be exercised in a manner that frustrates or conflicts with the state court's ability to "vindicate vital state interests" *themselves*. Far from being "inconsistent with the deference to state court decisions that have shaped the developing contours of habeas corpus jurisprudence" (Pb 28), the holding in *Carter, supra* at 997, is perfectly "consistent with federalism and comity concerns" because it reads Rules 23(c) to exclude factors that are "peculiarly within the authority of the state to recognize and act upon." It is the petitioners' own theory of the scope of Rule 23(c) that is inconsistent with the true meaning of federalism in every respect. First, the theory invokes "deference" for the wrong type of state action. Petitioners are not asking for deference either to "state courts" or to "state decisions"; instead, they want deference to be accorded to the state's interest as an *adversary party* in habeas litigation. Petitioners have produced neither precedent nor compelling reasons why their interest in appealing a judgment that a particular trial did not measure up to settled notions of constitutional law and fundamental fairness should be placed in the same category as state law and procedures created by litigation-neutral authorities such as state courts and legislatures. More to the point, petitioners are asking not that state court judgments or processes be shown deference but, rather, that state prosecutors not have to resort to state courts *at all* to "vindicate" the "vital state interests" of protecting the community from allegedly dan-

gerous defendants. This is all that *Carter, supra* at 998, requires them to do. To allow concern for "vital state interests" to be converted from a shield protecting orderly state criminal justice processes into a sword against successful habeas applicants to be wielded by federal judges at a prosecutor's request at best fails to show honor or respect, much less "deference," to the traditional concepts of federalism and comity.

Petitioners' request that federal courts consider dangerousness as a factor in Rule 23(c) proceedings also conflicts with the ideal of federalism because it asks enforcement by federal judges of a so-called "vital state interest" that New Jersey and many other states refuse to allow their own courts to "vindicate" in cases involving pre-trial indictees, whose situation is similar to that of respondent (see Point IC, *infra.*) It is at best ironic that petitioners wish to have respondent confined by a district court judge pending appeal of the judgment entered below because of alleged dangerousness when they would be constitutionally disentitled to ask a judge of the Superior Court of New Jersey, Law Division, to order pre-trial confinement on the very same basis. *N.J. Const.*, Article I, par. 11; *State* v. *Johnson*, 61 N.J. 351, 360, 294 A.2d 245 (1972). Nor would the situation be different in any of the seventeen other states whose constitutions or statutes do not allow their judges to consider dangerousness to the community as a factor in pre-trial release. Gottlieb, "Public Danger as a Factor in Pretrial Release," *supra* at pages 11, 25. Nor, in theory at least, would the probable result be different in any of the eight other states which allow judges to consider the safety of the community in fashioning pre-trial release conditions but do not allow preventive detention of the defendant. *Id.* at pages 9-12. The remaining twenty-six state and federal jurisdictions that do allow pre-trial preventive detention offer a myriad if not bewildering array of systems for determining the definition of "dangerousness," defining the type and stan-

dards of proof for establishing it, establishing procedural requirements and hearings at which the issue can be resolved, and limiting the length of the period of detention. *Id.* at pages 13-16. See also J. Goldkamp, "Danger and Detention: A Second Generation of Bail Reform," 76 *Journal of Criminal Law and Criminology* 1, 15-28 (1986); Annotation, "Pretrial Preventive Detention by State Court," 75 A.L.R. 3d 956 (1977 and 1986 supp.). In order to conform with petitioners' theory regarding the scope of Rule 23(c), then, in half of the states a federal judge would have to order preventive detention of a state prisoner in defiance of the law of the very jurisdiction in which the prisoner was convicted. In the other half of the states, a federal judge might find himself in a position either of applying or construing state law, which this Court does not favor, *Mullaney* v. *Wilbur*, 421 U.S. 684, 690-91 (1975), or would have to ignore state law and create his or her own variety of preventive detention out of mere "broad discretion." To call such results "deference to state courts" is a grim joke.

A doctrine of preventive pre-trial detention that has found favor with only half of the states cannot be raised to the category of a "vital state interest" that this Court has shown deference to under the mantle of federalism and comity. Even if protection of the community is recognized as a vital state interest, however, the extreme variations in the states' treatment of that interest in the context of release of unconvicted defendants lends credence to the holding in *Carter*, *supra* at 996, that "the determination of 'dangerousness' can only be made by the state in accordance with state procedures."[9] Recognition of the wisdom

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[9] An interesting and ironic example of the propriety of the *Carter* holding is *Taylor* v. *Redman*, 500 F.Supp. at 459, which petitioners claim is contrary to *Carter*. In that case, the district court considered the state's claim that the defendant was dangerous, but rejected it in

of this holding by this Court would do nothing more than reaffirm earlier holdings that some determinations "are as much as matter of allocation as [they are] of analysis," *Miller* v. *Fenton*, 106 S.Ct. at 451-452, and that an important function of habeas corpus is "allowing the State to deal with these peculiarly local problems on its own." *Preiser* v. *Rodriguez*, 411 U.S. at 498.

Even if "the state's right to unfettered appellate review" is entitled to be noticed by this Court, petitioner's argument that dangerousness to the community should be a factor under Rule 23(c) fails to persuade because the supposed threat to their interest that they claim *Carter* represents simply does not exist. Petitioners posit a "Hobson's choice" between continuing their appeal and allowing the prisoner's release "even though he may have posed a danger to the community. . . ." or going to trial. (Pb 26-27) This "Hobson's choice" is a false one because the law is clear that taking the prisoner to trial will not ensure that the state will be able to keep him in custody, nor will continuation of the appeal of the granting of the writ inevitably mean that the prisoner will be released. Consistent with principles of federalism and comity, the question of continuation of custody under either scenario will depend on the law of the state involved. See *McGee* v. *Alaska*, 463 U.S. 1339 (1983) (Rehnquist, J., Circuit Justice).

Petitioners opine that abandonment of their appeal and initiation of a retrial will be necessary "in order to possibly retain respondent in custody. . . ." (Pb 27) The key

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part because the *state* courts had found "that Taylor was no longer a threat to society and was therefore entitled to be released . . ." This is much more clearly an example of "a matter traditionally reserved to the state authorities to decide," *Carter, supra* at 996, then it is an example of a federal court using dangerousness as a factor under Rule 23(c).

word in this formulation is "possibly," because it bespeaks recognition of the fact that exercise of the retrial option does not guarantee that the state will be able to keep the prisoner in custody. Taking the prisoner to trial would mean subjecting him to whatever rules that the states courts have established for pre-trial bail. In New Jersey, as in twenty-five other states, continued custody of the prisoner, then, will depend on the establishment of conditions that will reasonably assure his or her appearance at trial and nothing more. *Fisher* v. *Rose*, 757 F.2d 789, 791 (6th Cir. 1985); *Gaiten* v. *Stahl*, 337 F.Supp. 1044, 2045 (W.D.N.C. 1972). Unless the prisoner is unable to post even the minimum bond necessary to assure his appearance, he will be released pending retrial, as respondent himself was during most of the period between his arrest and original trial. Similarly, even if the *Carter* holding applies, a successful habeas prisoner can be held during the pendency of the State's appeal[10] in the circuit court if he faces retrial in a state which allows pretrial preventive detention unless, of course, such detention is subject to attack on other constitutional grounds. *Carter, supra* at 998. See also *United States* v. *Salerno*, 794 F.2d 64, 71-72 (2nd Cir. 1986), *cert.* granted ___ U.S. ___ (1986); *Melendez-Carrion*, 790 F.2d at 1005-1009 (Feinberg, C.J., concurring). *Fisher* v. *Rose*, 757 F.2d at 791-792. Either way, nothing "prevents the State from dealing with a habeas releasee who will be retried as the State would deal with any other State prisoner who has yet to stand trial." *Carter, supra* at 998.

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[10] It should also be noted that the passage of the period during which the writ is conditional without initiation of retrial or other proceedings by the state because of its decision to proceed with an appeal from the granting of the writ does not bar the state from reprosecuting the defendant after the appeal has run its course. *Fisher* v. *Rose*, 757 F.2d at 791; *United States ex rel. Brown* v. *Rundle*, 427 F.2d 223, 224 (3rd Cir. 1970); *Latzer* v. *Abrams*, 615 F.Supp. 1226, 1227-1228 (E.D.N.Y. 1985).

It would appear that petitioners' "repugnant" choice has considerably less to do with *Carter, supra* or with Rule 23(c) at all as it has to do with the practice of "conditional writs" itself. It is certainly true that if the state elects to retry a prisoner or otherwise correct the constitutional defect that rendered the state court proceedings unfair, an appeal from the granting of the writ cannot proceed. *Pitchess* v. *Davis*, 421 U.S. 482, 490 (1975); *Johnson* v. *Smith*, 764 F.2d 114, 115 (2nd Cir. 1985); *Galloway* v. *Stephenson*, 510 F.Supp. 840, 845-846 (M.D.N.C. 1981). Respondent would submit, however, that the state's quandry in this regard is based not on the question of a prisoner's continued custody but, rather, on whether or not the state can "go to retrial without the benefit of evidence which a district court has ruled inadmissible on fourth, fifth, or sixth amendment grounds. . . ." (Pb 25-26) The vast majority of habeas cases simply do not present "difficult or unsettled" or even novel constitutional claims (Pb 29). Where they do the potential impact on the docket of habeas courts themselves will be a sufficient federal interest to justify a stay of the judgment, particularly in cases where a prisoner's continued custody is a foregone conclusion anyway. *Grigsby* v. *Mabry*, 583 F.Supp at 631-632. In the run-of-the-mill habeas case, however, the issue invariably can be reduced to applying settled constitutional law to the peculiar facts of a particular trial. That is certainly the case in the instant matter. *Braunskill* v. *Hilton*, 629 F.Supp. 511, 521-526 (D.N.J. 1986), aff'd ___ F.2d ___ (3rd Cir. 1986) (App. 17-26). The "Hobson's choice" of appeal or retrial, then, is basically a strategic decision by the state based on whether or not the prosecution can prove its case without the evidence that has been suppressed or, even if it can, whether the basis of its appeal is strong enough to risk putting off a retrial until an appellate court has clarified the situation. While this may represent a "difficult choice

of remedies" (Pb 29), it is no more unfair or improper than any of the delicate choices that defendants face every day in the criminal justice system and that this Court has declared to be constitutional. *Corbitt* v. *New Jersey*, 439 U.S. 212 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). Indeed, the state's purported "Hobson's choice" is considerably less unfair than those that defendants face because the State has vastly more resources and time to devote to its decision than any defendant, regardless of his or her means. *Benton* v. *Maryland*, 395 U.S. 784, 796 (1969).

Regardless of the sincerity of petitioners' concerns regarding public safety, there is no lack of "fundamental fairness to the state and the general public" (Pb 30) in refusing to allow federal courts to do to successful habeas applicants under the guise of Rule 23(c) or (d) what the constitutions, legislatures, and voters of New Jersey and other states refuse to allow their own courts to do when petitioners or other law enforcement authorities raise the specter of dangerousness to the community with regard to similarly situated pre-trial indictees. And it surely is not fundamentally unfair to refuse to allow petitioners to use a wholly-invented "Hobson's choice" regarding its right to appeal to turn settled concepts of federalism and comity on their heads. The holding of *Carter*, *supra*, represents a far more satisfactory accommodation of the concerns of federalism and comity because it holds not that dangerousness concerns are unimportant but, rather, that the "State has simply chosen the wrong forum in which to present an application based on the traditional state concerns of dangerousness, and has provided no authority for extending federal power into such an area." *Id.* at 998 n. 6. A court as concerned with the interests of federalism as this Court surely is will not allow petitioners to use the limited discretion provided to federal courts under Rule 23(c) as a means of protecting themselves from the laws of their own state.

C. Respondents' Legal Status As A Defendant Who Has Been Indicted But Not Convicted Of A Crime Precludes Granting A Stay Of His Enlargement Based On Alleged Dangerousness To The Community In The Absence of Specific Authorization In Rule 23(c) Or An Equivalent Statute Or Rule.

In Point II of their brief, petitioners argue that granting a stay of the enlargement of a successful habeas applicant either is a "justifiable continuation of punishment" or is a permissible means of furthering a valid state objective other than punishment (Pb 37-38). Either of these positions hinge directly on rejection by both petitioners and the Solicitor General of the holding in *Carter, supra* at 998, that the position of a habeas releasee is the same as "any other State prisoner who has yet to stand trial" because it is the releasee's "*conviction*, not his *indictment*, which has been declared unconstitutional by the federal court" (emphasis in original). Petitioners' assumption that respondent is not in the same legal position as a pre-trial defendant is without foundation in law. Once it is recognized that a prisoner who obtains a writ of habeas corpus is legally in the position of an unconvicted defendant, petitioners' various justifications for "continuing" his "punishment" based on considerations of dangerousness vanish because they all depend on caselaw that applies solely to prisoners with valid state convictions or derive from specific state or federal statutes permitting detention to be based on predictions of dangerousness.

Both petitioners' and the Solicitor General's briefs are festooned with statements to the effect that a state court judgment of conviction from which a prisoner has obtained relief by obtaining a writ of habeas corpus is entitled to "respect" or "deference" because the grant of the writ only "casts doubt upon [its] validity" or only identifies a "flaw" or "infirmity" in the judgment (Pb 31 n. 6, 36, 37, 40; Ab 9, 13). Such statements seem to harken back to a time long past when the writ of habeas corpus

was available only to test the jurisdiction, in a narrow sense, of the committing court. *Frank* v. *Mangum*, 237 U.S. 309 (1915). It is now firmly established, however, that the central and unquestioned purpose of the Great Writ is to allow a court of competent jurisdiction to determine whether a conviction is invalid because it was obtained in violation of the constitutional requirement of due process of law. "[W]hatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial . . ." *Id.* at 346-347 (Holmes, J., dissenting). See also *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Fay* v. *Noia*, 372 U.S. at 402, 409. A conviction obtained in violation of due process of law is not "valid" for any purpose; it "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Ex parte Siebold*, 100 U.S. 371, 376-377 (1879). The fact that a conviction is nullified in this manner by "a single district court judge" (Pb 29) is of no consequence given the fact that in several periods of our history the power and authority of lower federal courts in habeas cases was greater even than that possessed by this Court on appeal. See *Ex parte Watkins*, 3 Pet. (28 U.S.) 193 (1830), as discussed in *Fay* v. *Noia*, 372 U.S. at 407. Proof that a conviction found to be in violation of due process is null and void for any purpose also can be inferred from the substantial body of law that holds that a writ of habeas corpus affects collateral consequences of a conviction apart from custody itself. *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968); *Mizell* v. *Attorney General of New York*, 586 F.2d 942, 948 (2nd Cir. 1978), *cert.* den. 440 U.S. 967 (1979). At minimum, such a conviction cannot be used to justify "continuation of punishment"; even cases relied upon by petitioners stress that "a detainee may not be punished prior to *an adjudication of guilt in accordance with due process of law.*" *Bell* v. *Wolfish*, 441 U.S. 520, 536

(1979) (emphasis added); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-166 (1963). Any claim that a conviction found to be unconstitutional by a district court in a habeas proceeding is "entitled to deference" (Ab 13) has a particularly hollow ring in the case at bar, where both the district and circuit courts have held that due process was violated because respondent was denied his Sixth Amendment right to have the jury consider probative evidence that he was not guilty of the charge against him. See App. 17-26 and 35-36.

Respondent recognizes that his position is not perfectly identical to that of a pre-trial indictee only because "the district court's finding is the subject of appellate review and may well be reversed." (Pb 40) Until this possibility occurs, however, this is a distinction without a difference. Relevant caselaw uniformly holds that the mere filing of an appeal does not *per se* stay a judgment of appeal under either Rule 23(c) or Rule 8(a), upon which petitioners place misguided reliance. *Barnwell*, 461 F.2d at 679; *Jago*, 570 F.2d at 622; *Johnson* v. *Scully*, 563 F.Supp. 851, 880 (E.D.N.Y. 1983). State criminal judgments invalidated in habeas proceedings certainly are not entitled to *res judicata* effect for any purpose. *Fay* v. *Noia*, 372 U.S. at 422; *Preiser* v. *Rodriguez*, 411 U.S. at 497-498. The fact that a judgment of a district court granting a writ of habeas corpus later may be found to be erroneous does not mean that it is not final for all intents and purposes unless it is affirmed (Ab 13). *Browder* v. *Director*, 434 U.S. at 266. To claim, then, that a stay of enlargement of a prisoner who has obtained a writ of habeas corpus is appropriate because his unconstitutionally-obtained judgment of conviction is entitled to "deference" despite the fact that the district court judgment has not been disturbed in any way is simple bootstrapping.

Practical as well as legal considerations militate in favor of equating a prisoner who has obtained a writ of habeas

corpus with a defendant who has yet to stand trial. The state, of course, is not the only party to a habeas proceeding that faces the possibility of having to participate in a new trial; if, as in the case at bar, the circuit court affirms the granting of the writ and this Court does not reverse the judgment, the prisoner must prepare to have his guilt or innocence tested by a jury. As with pretrial indictees, prisoners who have been granted writs "are handicapped in consulting counsel, searching for evidence, and preparing a defense." *Stack* v. *Boyle*, 342 U.S. at 8 (Jackson, J., concurring). Detaining such a prisoner under Rule 23(c) solely because of a claim by the state that his dangerousness is established by the very judgment that has been found to be unconstitutional (Pb 40) at best adds insult to the injury described in *Stack*.

As noted consistently throughout this brief, the essential function of the Great Writ is to deliver a prisoner from custody or any other consequence of a conviction that the State has obtained in violation of fundamental constitutional law. If the prisoner's incarceration is to be continued pending appeal of the granting of the writ, it stands to reason that it should only be for reasons that complement or at least do not conflict with this essential function. These reasons by definition cannot include "continuation of punishment." The costs of such a "continuation" in terms of the efficacy of the writ itself cannot be ignored. The fact is that the legally questionable "Hobson's choice" faced by petitioners is nothing compared to the prejudice that would be suffered by respondent, who "is threatened with immediate inseparable injury in the form of continued unlawful incarceration if he is not immediately released." *Taylor* v. *Redman*, 500 F.Supp. at 460. Since respondent had served five years in prison and was going to be paroled in only seven months under his original sentence when his enlargement became effective, granting of the requested stay would have meant that in

practical terms he would have had to serve the entire custodial sentence imposed pursuant to his unconstitutionally-obtained conviction before the appeal of the district court's judgment was completed.[11] Such a result cannot lightly be countenanced. *LaFrance*, 407 F.2d at 507; *Alim* v. *Smith*, 474 F.Supp. 54, 63 (W.D.N.Y. 1979).

The cases cited by petitioners that uphold court, jury or parole board actions predicated on considerations of a defendant's dangeousness (Pb 40) do not apply legitimately to respondent and similarly situated prisoners in any way. These cases have two vital characteristics in common. First, they concern predictions about the future dangerousness of defendants who have *presently valid convictions* for an offense. This obviously contrasts with the situation of a prisoner whose conviction has been nullified by the granting of a writ of habeas corpus. Second, in these cases, as well as in *Schall* v. *Martin*, 467 U.S. 253 (1984) (upholding statute allowing detention of dangerous juveniles for a limited period prior to delinquency hearings as a legitimate exercise of the state's *parens patriae* responsibility), the detention was justified by validly enacted state statutes which were specific in their grants of authorization and which carried within them adequate procedural safeguards against erroneous

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[11] Equating a successful habeas applicant with a pretrial indictee, of course, requires recognition of the fact that the prisoner shares the disadvantages as well as the advantages that go with this status. A recipient of a writ of habeas corpus who cannot post a bail reasonably determined to be necessary to assure his or her appearance, like a pre-trial detainee in the same position, may be held for months or even years before he or she is either acquitted at trial or convicted of a lesser offense carrying a maximum sentence that is less than the time that he or she already has been held. This is theoretically, at least, not "continuation of [the prisoner's] punishment," however; it is simply the vindication of the federal interest recognized in *Carter*, *supra* at 995, even when hindsight shows that such vindication constituted an unfortunate injustice.

and unnecessary deprivations of liberty. In the case at bar, this Court is presented with nothing more than a sparsely worded rule that contains a very unspecific grant of limited discretion. It is at best improper to equate Rule 23 (c) with the detailed statutory schemes that this Court has previously approved in the face of constitutional challenges, particularly when the interests of federalism and comity are satisfied by the protection of petitioners' right to resort to far more specific state laws regarding pre-trial confinement or release in appropriate cases contained in *Carter, supra* at 997-998.

In summary, respondent submits that nothing in Rule 23(c) itself justifies the conclusion that federal judges have the discretion to deny the enlargement of a prisoner who has obtained a writ because of predictions regarding the prisoner's alleged dangerousness to the community. Indeed, the nature of habeas corpus itself and the principles of federalism and comity that are intertwined with it strongly support the propriety of the construction of Rule 23 (c) and (d) outlined in *Carter, supra*. If this Court should hold that Rule 23(c) allows for detention on the basis of dangerousness, then respondent would contend that the equivalency between his legal situation and that of a pretrial indictee renders incarceration on this basis "repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *United States* v. *Salerno*, 794 F.2d at 71-72; see also *Melendez-Carrion*, 790 F.2d at 998-1004. Since this contention will no doubt be briefed, argued and discussed thoroughly by this Court in connection with the proceedings following the granting of *certiorari* in *Salerno, supra*, there is no need for respondent to elaborate on this point.

POINT II

THE CASE AT BAR IS AN INAPPROPRIATE VEHICLE FOR RESOLUTION OF THE ISSUES RAISED BY BOTH PARTIES.

Petitioners recognize that it is "undoubtedly true" that at some point this case may become moot because "this Court's decision may not affect this particular respondent" (Pb 43). They argue, however, that even if this eventuality occurs, this Court should render an opinion in this case primarily because such an opinion may be important in future Rule 23(c) cases involving *other* defendants (Pb 47-49). Respondent contends that the "capable of repetition yet evading review" doctrine that petitioners rely upon to keep this case alive has not and cannot fairly be applied to cases that present issues that are moot as to the parties to the matter at bar but may affect situations involving the state and a third party. Even if this case does not become moot during the course of these proceedings, this Court should dismiss the writ of *certiorari* as improvidently granted because the orders entered below denying the motion for stay or revocation of respondents' enlargement turned primarily on this case's individual facts rather than on the legal reasoning that may or may not distinguish the holding in *Carter*, *supra*, from other cases.

The Third Circuit Court of Appeals affirmed the order granting respondent a writ of habeas corpus on December 2, 1986. Petitioner's motion for rehearing pursuant to *Fed. R. App. P.* 40(a) was filed on or about December 15, 1986. If that motion is denied, then petitioners would have at most ninety days from the date of the order to petition for *certiorari* in this Court, and respondent would have thirty days from his receipt of the petition to file his brief in opposition. See Rules 20.4 and 22.1 of this Court. Since this Court will undoubtedly rule on the petition before the end of this Term, it is highly possible, if not quite likely,

that the petition for *certiorari* on the merits of the granting of the writ could be denied before this Court has rendered an opinion in the instant matter. If this occurs, then the issue in this case is obviously moot because the appeal of the merits that is the necessary predicate for stay action under Rule 23(c) would be at an end.

In *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975), this Court held that the "capable of repetition yet evading review" doctrine was limited to cases in which "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the *same complaining party* would be subjected to the *same action* again" (emphasis added). Regardless of the merits of petitioners' arguments concerning the first prong of this test (Pb 45-47), they cannot possibly satisfy the second prong by showing only that this Court's ruling can affect future disputes with defendants not parties to this case. In *Weinstein*, *supra* at 148, this Court ruled that Bradford's attack on the constitutionality of parole release procedures in North Carolina became moot when he was granted parole. The opinion makes it clear that the "same party" in the "same action" referred to the litigant claiming injury by state action and not to the state itself when it stated that "respondent, who challenged the 'governmental action or policy' in question, no longer has any present interest affected by that policy." The necessary inference from this language was made clear in *Lane* v. *Williams*, 455 U.S. 624, 634 (1982), where this Court ruled that the "possibility that other persons may litigate a similar claim does not save this case from mootness." Whether or not petitioners are "susceptible to future injury" because "the same circumstances will occur repeatedly" in unrelated cases, then, is not a cognizable factor for purposes of the "capable of repetition yet evading review" doctrine. If it should occur that a petition for *certiorari* on the merits of

this case is denied prior to the issuance of an opinion in this matter, any such order should be accompanied by a separate order dismissing this case as moot.

Even if this case does not become moot prior to the issuance of an opinion by this Court, repondent submits that the background of this matter strongly points to the conclusion that on its facts this case is not an appropriate vehicle for this Court's examination of the proper construction of Rule 23(c). In an interlocutory matter of this sort, the petitioners should have the burden of showing (or, at least, the evidence when fairly viewed should disclose) that the result below might be different if their interpretation of Rule 23(c) and (d) were adopted by this Court and the case was remanded for further proceedings. "We do not suggest that district courts should grant even brief 'turn-around' stays when appeals are frivolous, or when justice requires that no further delay take place." *LaFrance* v. *Bohlinger*, 487 F.2d at 508. Petitioners simply have failed to show that they will prevail below even if the very factors they rely on are applied to the case.

In Point IC of their brief, petitioners argue that they were not given a proper opportunity to present their claims regarding respondent's alleged dangerousness because the district court refused to consider it as an independent factor under Rule 23(c). Such an argument sidesteps the fact that although the district court recognized that its discretion to grant or deny the stay was defined by *Carter, supra*, it gave the state a full and fair opportunity to substantiate its claim that defendant was a danger to the community (JA 11; Tr 5-13 to 21). Although defendant had pled guilty and served almost all of his sentence on an unrelated conviction for third-degree burglary and theft before the stay hearing was held, the Deputy Attorney General never even mentioned this to the district court. Instead, he initially pointed to respondent's alleged "long prior record" as support for its claim

(JA 9; Tr 2-22 to 23). After closer inspection of respondent's presentence report, however, the Deputy Attorney General had to admit that "I was in error by making that statement" because his offense history only disclosed a prior adult disorderly persons conviction (the equivalent of a non-indictable common-law misdemeanor) in 1979 and a juvenile complaint for robbery that had been dismissed in 1976. (JA 12-13; Tr 5-22 to 7-21) He then argued that "the facts of this particular case substantiate [that respondent] committed a very serious crime. On that basis, his dangerousness is established . . ." (JA 13-14; Tr 7-22 to 8-5) Although it did not address this point specifically, the district court obviously rejected it as a basis for granting a stay, as well it should have. *Cagle* v. *Davis*, 520 F.Supp. at 312 (fact that petitioner may have to be retired on a capital offense does not justify a stay of enlargement *per se*). See also *Barnwell* v. *Rundle*, 461 F.2d at 770. Thus, it is apparent that the record below is devoid of any credible evidence that respondent's enlargement conceivably places the community at risk and a remand for consideration of that factor would inevitably result in denial of petitioners' motion for revocation on that basis.

A similar conclusion must be reached regarding any claim based upon petitioners' chances of success in the appeal of the district court's order granting respondent's petition for a writ of habeas corpus. The opinions of the district court and the circuit court below themselves rebut the notion that petitioners have a "great" chance of reversal on appeal far more eloquently than respondent's attorney can. In brief, respondent was denied the opportunity to call his sole alibi witness in his defense because his attorney filed the notice of alibi out of time. He was precluded from calling the witness even though the prosecutor knew the witness' identity and had actually interviewed the witness a week prior to trial. Significantly, on appeal in the Third Circuit, petitioners did not contest the

district court's ruling that respondent's Sixth Amendment right to call witnesses on his behalf was violated; instead, they only took issue with the ruling that this error was not harmless beyond a reasonable doubt, notwithstanding the fact that it took the jury two and a half days to reach a verdict in a case that took only one day to try.

Respondent respectfully submits that his prediction in his brief in opposition to the petition for the writ of *certiorari* (page 6) that petitioners' chances of success on appeal were "minimal to non-existent" has been fully borne out as of the date of this writing. Furthermore, the opinion of the Third Circuit does not support any claim that petitioners will be successful in obtaining a writ of *certiorari* in this Court, much less that this Court will see fit to reverse the lower court's judgment. As noted previously, petitioners' principal claim on appeal was that the violation of respondent's Sixth Amendment right to present witnesses on his behalf was harmless beyond a reasonable doubt.[12] The circuit court found that this claim had to fail under the test set forth in *Chapman* v. *California*, 386 U.S. 18 (1967), which both parties agreed was the appropriate yardstick for measuring petitioners' arguments. In so doing, the circuit court relied heavily on the peculiar facts of this case. (App. 35-36) This alone suggests that this Court is unlikely to exercise its *certiorari* discretion in petitioners' favor.

In sum, respondent contends that the foregoing facts do not support petitioners' claim that the courts below

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[12] Petitioners also claimed that respondent's habeas petition was barred by the doctrine of "procedural default" under *Wainwright* v. *Skyes*, *supra*, and its progeny. This claim was thoroughly reviewed and rejected by the circuit court, primarily because petitioners had waived their right to raise it on appeal in the first place (App. 32-35). See *Estelle* v. *Smith*, 451 U.S. 454, 468 n.12 (1981).

blindly followed *Carter* when they denied the motion for a stay or revocation of respondent's enlargement. As noted in respondent's brief in opposition to the petition for a writ of *certiorari* (page 6), petitioners' brief in the Third Circuit in support of the motion for stay or revocation of enlargement both attacked the holding in *Carter, supra*, and sought to persuade the court that its request was justified under the caselaw relevant to Rule 8(a) motions. The Third Circuit denied the motion on May 27, 1986, without even waiting for respondent to file a brief in response (JA 21-22). In so doing, the court acted with full cognizance of the certified record possessed by this Court. The dispatch with which petitioners' motion was rejected strongly suggests that the refusal to grant *en banc* consideration was motivated more by the Third Circuit's belief that this case was an unsuitable vehicle for examination of the *Carter* holding than by mere adherence to the holding or reasoning behind the opinion itself. Any such conclusion by the circuit court is nearly compelled by the instant record and should form the basis *per se* for dismissal of the writ of *certiorari* as improvidently granted.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the United States Court of Appeals for the Third Circuit be affirmed or, in the alternative, that *certiorari* be dismissed.

Respectfully Submitted,

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Date: January 2, 1987

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT,
D. NEW JERSEY

DANA BRAUNSKILL, *Petitioner*,

v.

GARY HILTON, Superintendant, New Jersey State Prison, Trenton, New Jersey and Irwin I. Kimmelman, Attorney General of New Jersey, *Respondents*.

Civ. A. No. 85-2008.*

FEB. 27, 1986

OPINION

HAROLD A. ACKERMAN, DISTRICT JUDGE.

Petitioner Dana Braunskill, presently confined at New Jersey State Prison in Trenton, brings this *pro se* petition for habeas corpus under 28 U.S.C. § 2254. The issue in this case is whether it is constitutionally permissible in a state criminal prosecution for the trial judge to refuse to permit an alibi witness to testify solely because defense counsel did not respond to the state's discovery request within the time required by the state's notice of alibi rule. I hold that under the circumstances of this case, in agreement with Judge Stern in

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* This opinion is published at 629 F.Supp. 511 (D.N.J. 1986). The opinion was inadvertently deleted from the joint appendix and is reproduced herein for the convenience of the parties and this Court.

Hackett v. *Mulcahy*, 493 F.Supp. 1329 (D.N.J. 1980), that petitioner's sixth amendment right to call witnesses in his defense outweighs the state's interest in enforcing its notice of alibi rule and that the preclusion sanction violated petitioner's sixth amendment right. Therefore, the petition for habeas corpus relief will be granted.

On January 30, 1981, petitioner was convicted in the Superior Court, Law Division, Essex County, New Jersey, of first degree sexual assault in violation of N.J.S.A. 2C:14-2, and fourth degree unlawful possession of a knife contrary to N.J.S.A. 2C:39-5(d). On March 26, 1981, petitioner received sentence for aggravated sexual assault charge, to run concurrently with an eighteen month sentence for the weapons charge. The Appellate Division affirmed the conviction on December 14, 1982, and the Supreme Court of New Jersey denied certification on March 2, 1983. Petitioner filed this habeas corpus application on April 26, 1985. He alleges denial of his right to call witnesses in his defense, ineffective assistance of counsel, and improper reference to his criminal history in violation of his constitutional rights.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 12, 1980, Jane Lyons, a sixty-nine year old woman, exited a bus and entered the lobby of her apartment building, the Troy Towers, in Bloomfield, between 12:15 and 12:30 a.m. She obtained her mail from her mailbox in the rear of the lobby, and as she turned to walk toward the elevator, she felt an arm around her throat. Ms. Lyons told her assailant to take her money but he did not; rather, he struggled with her until he got her down on the floor. The assailant then opened his trousers and exposed himself and told Ms. Lyons that if she followed his orders, he would not hurt her. He was holding a knife near her throat which the victim attempted to push away; in so doing she cut her hands severely. Her assailant then forced her to perform fellatio on him. During this incident Ms. Lyons heard someone enter the lobby and heard a voice, but she was unable to view the person because she was facing a wall. Shortly

thereafter, the assailant left. Ms. Lyons entered the elevator and went to a neighbor's apartment, where she summoned the police.

Officer Michael Sailer of the Bloomfield Police Department was on routine vehicle patrol on June 2, 1980, when he received a radio report that an assault had occurred in the Troy Towers. Sailer and his partner proceeded to the apartment building and searched the lobby, where they found blood smeared on the floor in the vicinity of the elevator. The officer observed that the elevator control dial indicated that the elevator was on the sixth floor, so he and his partner ascended to that floor to search for the victim. The officers found Ms. Lyons, who was extremely upset and bleeding profusely from her wounds. The officers transported the victim to a local hospital for treatment.

Ms. Lyons was unable to get a good look at the face of her attacker. She told Officer Sailer that her assailant was black, between 5'6" and 5'9" in height, of medium build, and was wearing dark clothes and a jacket.

The defendant was identified by two witnesses. Both of these witnesses testified that the lighting conditions in the lobby where the incident occurred were very good. Josette Amabile, who also resided in Troy Towers testified that she entered the lobby shortly after midnight to retrieve her mail. She said she saw an elderly white woman against a wall on her knees and a black male who appeared to be seated or squatting. Ms. Amabile testified that she had direct eye contact with the male for approximately five seconds, at which time he groaned and covered his face with his hand. Ms. Amabile realized that something was wrong, and she ran back to the elevator.

Joseph Scherer, also a resident of Troy Towers, stated that he entered the lobby shortly after midnight. He noticed a commotion near the elevator and observed a black man whom he identified as the defendant struggling with a white woman. Mr. Scherer picked up a heavy ashtray and was about to strike the man when the assailant told Mr. Sherer to leave or he would kill the victim. Mr. Scherer left and telephoned the police.

Detective Donald Peters of the Bloomfield Police responded to the crime scene at 4:30 a.m. on the morning of June 12, 1980, and interviewed Mrs. Amabile. The detective showed the witness six photographs, and she identified the defendant as the assailant. At 6:00 p.m. on the same date (eighteen hours after the attack), the detective interviewed the victim, but she was only able to give him a general description of her attacker and was unable to make a photographic identification. Ms. Lyons nevertheless testified on cross-examination that she believed the defendant was the man who attacked her. Detective Peters showed the victim defendant's photograph because Peters had previously been involved in investigations concerning sexual crimes. At approximately 8:00 p.m. on the same date, Peters interviewed Joseph Scherer. Peters showed the witness the same photo spread he had earlier shown to Amabile, and Scherer also identified defendant as the assailant.

Detective Michael Sisco, who knew petitioner prior to June 11, 1980, testified that he saw him in the dark clothing walking around Bloomfield in the direction of the Troy Towers Building, between 10:15 and 10:30 p.m. on the night in question. Detective Peters testified that he also saw Braunskill at around 11:30 that evening when he was patrolling in an unmarked vehicle. Detective Peters stated that he saw other black males dressed in dark clothing walking around Bloomfield that night, but admitted that none of these individuals were depicted in the photos shown to Ms. Lyons or other witnesses.

Dana Braunskill testified that he was not in Troy Towers that evening, contending that it was a case of mistaken identification. He testified that he was not wearing dark clothing on that night. The victim, who had described her assailant's clothing as dark, saw the assailant in a well-lit lobby. Defendant testified that several hours prior to midnight he visited a couple of bars and diners in Bloomfield and Orange. Except for a ride by an acquaintance from the Sixty-Five Club on Washington Street in Bloomfield to the Halftime Emporium on Broad Street in that city, defendant walked from place to place. In the course of the evening, defendant walked across the street from an under-

pass which leads to the Troy Towers parking lot. He further testified that he arrived at the apartment of his girlfriend, Florine Moore, with whom he was living at the time, shortly after 11:30 p.m. He stated that Ms. Moore was on the telephone when he came into the apartment. Defendant further testified that after his arrival at Ms. Moore's apartment at 219 Park Place in Orange, he did not go out again.

Petitioner also related that on a number of occasions in the past he had been stopped by Detectives Peters and Sisco and other members of the Bloomfield Police Department who had allegedly attempted to arrest him without cause.

The jury began deliberating at 11:55 a.m. on January 28, 1981. At 4:00 p.m. they advised the court that they were not ready to reach a verdict and were sent home. The jury resumed deliberations at 9:00 a.m. the next day. At 12:15 p.m. they asked the Court whether Josette Amabile was asked whether she knew the police officers, and whether either Detective Peters or Detective Sisco testified that they were working together on the evening in question. Although these circumstances were not testified to, the judged told the jury they would have to rely on their own recollections. At 2:20 p.m. on January 29, the jury informed the court that they were unable to reach a unanimous decision. The judge instructed the jury to continue deliberating. At 3:55 p.m. the jury was sent home. On January 30, 1981, the jury began its third day of deliberations at 9:15 a.m. At 12:30 p.m. the judge called the jury into the courtroom and asked the foreman whether further deliberations would be fruitful. The foreman advised the trial judge that they would. At 3:10 p.m., the jury reached a verdict, finding defendant guilty of sexual assault and unlawful possession of a knife.

On March 26, 1981, the court denied defendant's motion for a new trial and sentenced him to an eight-year state prison term with a four-year parole disqualifier on the sexual assault count, and a concurrent eighteen-month term on the weapon count.

A notice of appeal was filed with the Appellate Division on May 11, 1981. In a *per curiam* opinion dated December 14, 1981, the Appellate Division affirmed defendant's conviction and sentence. The Appellate Division found that the trial court committed several errors, but found them to be harmless, and with respect to one issue not raised at trial, not plain error. A notice of petition and a notice of appeal were filed with the Supreme Court of New Jersey on January 3, 1983. The petition for certification was denied on March 2, 1983.

This was a one day trial which began and ended on Tuesday, January 27, 1981. Two weeks and one day prior to trial (on Monday, January 12, 1981), petitioner's trial counsel telephoned the assistant prosecutor and informed him that a notice of alibi was going to be filed. A notice of alibi was filed and served on the Prosecutor on January 21, 1981, six days prior to trial. It listed Florine Moore and her address.

The prosecutor argued that the alibi witnesses ought to be precluded from testifying because the notice failed to comply with the time requirement of New Jersey Court rule 3:11-1, notwithstanding the fact that the prosecutor had already interviewed Florine Moore the previous Friday.

Defense counsel stated that his notice was out of time because there had been a long period of time between his verifying that Ms. Moore was a witness, and his actually seeing her. As Ms. Moore was no longer defendant's "girlfriend," defendant had had trouble securing her for an interview. Defense counsel stated to the court that he wanted to speak to the witness before filing the notice. Defense counsel also argued that the state's case "would not be prejudiced one iota" and that the state probably had more information than he did, since the prosecutor had already interviewed Ms. Moore.

The trial judge not only denied the motion to add the name of Ms. Moore, but also precluded an alibi testimony. His entire ruling on the issue is as follows: "Mr. Greenspoon [defense counsel], I'm going to rule on the question of alibi that you're way out of time, I should preclude under the rules from assert-

ing that defense through other witneses other than the defendant [sic]. He may do so, I cannot stop him." (exhibit 9R at 7)

The Appellate Division found that the trial judge failed to follow the direction of *State* v. *Francis*, 128 N.J.Super. 346, 350-351, 320 A.2d 173 (App.Div.1974), with regard to determining whether the State had been disadvantaged by the late alibi notice, and if so, whether alternatives to exclusion of the witness were feasible. The Appellate Division further observed that while the trial judge failed to explore the need for and possibility of a reasonable continuance, "in a not even-handled manner, he granted the State's application to produce evidence beyond discovery supplied defendant by the State, and offered a continuance if defendant claimed to be surprised by the new material." (Exhibit 3R at Appendix 8a). The Appellate Division made no comment regarding the fact that the prosecutor had interviewed the alibi witness several days prior to trial.

The Appellate Division found that the proposed alibi testimony would have been of "dubious value." The court gave no indication as to how it reached that conclusion. The Appellate Division held that even if the exclusion of defendant's alibi witness constituted constitutional error, it was satisfied "beyond a reasonable doubt that any such error did not affect the verdict."

EXHAUSTION OF REMEDIES

A federal court will not consider an application for a writ of habeas corpus unless it appears that the applicant has exhausted the remedies available in the state courts. 28 U.S.C. § 2254(b). Not only must the applicant have fairly presented the substance of his habeas corpus claims to the state courts for adjudication on the merits, *Pitchess* v. *Davis*, 421 U.S. 482, 488, 95 S.Ct. 1748, 1752, 44 L.Ed.2d 317 (1975); *Picard* v. *Connor*, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971); *Swanger* v. *Zimmerman*, 750 F.2d 291, 295-96 (3d Cir.1984); *Jones* v. *Superintendant of Rahway State Prison*,

725 F.2d 40, 41 (3d Cir. 1984); *Zicarelli* v. *Gray*, 543 F.2d 466, 472-75 (3d Cir.1976), but he must have availed himself of all opportunities available in the state courts to raise the questions presented in his application. 28 U.S.C. § 2254(c); *Rose* v. *Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

The state argues that petitioner has not availed himself of all state remedies. It contends that even if petitioner has presented his claims to the Appellate Division and the Supreme Court of New Jersey, he still has recourse to the courts by application for post-conviction relief, pursuant to New Jersey Court Rule 3:22-1 et seq. This argument is meritless. It is well settled that once a claim has been directly appealed to the state's highest court, it will be considered exhausted even if no post conviction relief is sought. *Jones* v. *Superintendent of Rahway State Prison*, 725 F.2d 40, 41-42 (3d Cir.1984); *United States ex rel Hickey* v. *Jeffes*, 571 F.2d 762, 764 (3d Cir.1978); *United States ex rel Schultz* v. *Brierley*, 449 F.2d 1286 (3d Cir.1971); *Morrison* v. *Kimmelman*, 579 F.Supp. 796, 801 (D.N.J.1984).

The state also contends that the claims petitioner now raises, were not "fairly presented" in the state courts. It contends that if even one claim remains unexhausted, a federal court must dismiss the claim. *Rose* v. *Lundy*, 455 U.S. 509, 510, 102 S.Ct. 1198, 1199, 71 L.Ed.2d 379 (1982). The petitioner would then have the "choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id.*

28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to consider his constitutional claim. *Anderson* v. *Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982); *Picard* v. *Connor*, 404 U.S. 270, 276-77, 92 S.Ct. 509, 512-13, 30 L.Ed.2d 438 (1971); *Brown* v. *Cuyler*, 669 F.2d 155, 158 (3d Cir.1982); *Zicarelli* v. *Gray*, 543 F.2d 466, 472 (3d Cir.1976). Petitioner does not satisfy this requirement by merely presenting the facts necessary to support the federal claim or by presenting a "somewhat

similar state-law claim." *Anderson* v. *Harless*, 459 U.S. at 6, 103 S.Ct. at 277. The habeas petitioner must have fairly presented to the state courts the "substance" of his federal habeas corpus claim. *Id.*

I now consider whether petitioner fairly presented the substance of his three claims to the state courts. Petitioner's first claim is that his conviction was obtained by depriving him of his sixth amendment right to call witnesses in his favor. Petitioner presented this argument both in his brief submitted to the Appellate Division (Exhibit 8R at 8) and in his petition for certification (Exhibit 3R at 7). Petitioner expressly referred to the violation of his sixth amendment right to present witnesses in his defense and cited federal precedent to support his arguments. The Appellate Division considered and rejected petitioner's Sixth Amendment argument, stating: "[E]ven if a constitutional error involving defendant's sixth amendment right occurred, a reversal would not be mandated since we are satisfied beyond a reasonable doubt that any such error did not affect the verdict." (Exhibit 3R Appendix at 8A).

The state acknowledges that the petitioner claimed a violation of the Sixth Amendment, but argues that "petitioner framed this claim primarily in terms of a violation of abuse of judicial discretion, pursuant to the New Jersey Court Rule 3:11-2". The state argues that petitioner did not fairly present his claim and has only stated "mere facts or grounds framed primarily in state procedural law and state case law." I disagree.

The state correctly observes that petitioner alleged that the exclusion of his witness constituted abuse of the trial judge's discretion in applying New Jersey Court Rule 3:11-2. However, this was a claim separate from and in addition to petitioner's constitutional claim. Petitioner's point heading in his brief to the Appellate Division made this clear. He argued: "The trial court's exclusion of the defendant's alibi witness constituted an abuse of discretion *and* violated the defendant's sixth amendment right to present witnesses in his defense." (exhibit 8R at

1, emphasis added). Petitioner aserted an alternate state-law ground for the court to consider but also fairly presented his federal constitutional claims.

The state's citation of numerous cases in which non-exhaustion is found is not persuasive. None of them apply to this case where the state court was presented with both a federal and state law claim. *Anderson* v. *Harless*, 459 U.S. 4, 7, n. 4, 103 S.Ct. 276, 279, n. 4, 74 L.Ed.2d 3 (1982) (citation to a state court decision predicated solely on state law ordinarily not sufficient to apprise a reviewing court of a potential federal claim); *Rose* v. *Lundy*, 455 U.S. 409, 102 S.Ct. 1188, 71 L.Ed.2d 379 (1982) (prisoner acknowledged non-exhaustion of two of his federal claims. "A district court must dismiss such mixed petitioners."); *Mabry* v. *Klimas*, 448 U.S. 444, 100 S.Ct. 2755, 65 L.Ed.2d 827 (1980) (state's highest court must be given an opportunity to consider petitioner's claim to right to be resentenced under new recidivist statute, even though petitioner had exhausted other claims related to alleged sentencing errors.); *Brown* v. *Cuyler*, 669 F.2d 155, 158 (3d Cir.1982) (*Miranda* waiver issue was distinguishable from involuntariness claim and was not fairly presented in the state court); *Zicarelli* v. *Gray*, 543 F.2d 466, 474 (3d Cir.1976) (mere reference by defendant's counsel to an opinion containing a constitutional claim did not fairly present the cross-section issue to the state courts).

I find that petitioner's claim of ineffective assistance of counsel in violation of the Sixth Amendment was fairly presented to the state courts. See Exhibit 3R at 16; Exhibit 8R at 29. The government does not dispute this finding.

Petitioner's final claim is that his conviction was obtained by improper reference to his probationary status and to prior arrests depriving him of a fair trial. The government argues that this claim is not cognizable on a habeas corpus petitioner. I disagree.

Mindful that complaints are to be liberally construed in the federal courts expecially when a party is proceeding *pro se*,

Haines v. *Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1971), I find that petitioner's habeas petition can reasonably be understood to raise a due process claim under the Fourteenth Amendment. Petitioner's failure to use specific constitutional language is not fatal for purposes of exhaustion. The Court in *Picard* v. *Connor*, 404 U.S. 270, 278, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971) stated that "[w]e do not imply that respondent could have raised the [constitutional] claim only by citing 'book and verse on the federal constitution.' . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts."

A determination of whether the substance of the petitioner's claim was advanced in the state proceedings requires "a searching scrutiny by the federal habeas court of the points that were raised in the state tribunals, in order to ensure that the state system was granted a fair opportunity to confront arguments that are propounded to the federal habeas courts." *Zicarelli* v. *Gray, supra*. In order to determine whether the "same claim" or the "subsequent equivalent" of the claim has been previously presented to the state courts, it is necessary to ask whether the "method of analysis" asserted in the federal courts was readily available to the state court. *Id.* The "method of analysis" is to determine whether the evidentiary errors of the improper references to petitioner's prior arrests and his probationary status were "fundamentally unfair." *See Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-43, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

In his brief to the Appellate Division, petitioner framed his claim of improper reference to his prior arrests and his probationary status in terms of "reversible error" and cited only state law (exhibit 8R at 17). Nevertheless, petitioner argued that the error deprived him of a "fair trial" (Id. at 17) and violated his "fundamental rights." (Id. at 23). The government also viewed the claim as a question of whether defendant received a "fair trial." (State Appellate brief at 12). The Appellate Division also considered the fairness of admitting the evidence, stating: "We do not regard any error that may have been committed by the

trial judge to have been clearly capable of producing an *unjust* result." (Exhibit 3R at 9a) (emphasis added).

In making this determination, it can be fairly concluded that the state courts implicitly held that petitioner's right to due process of law was not violated. Petitioner's "broadly alleged constitutional argument, together with the repeated assertion that he was denied a fair trial, is enough to satisfy the exhaustion requirement." *Bisaccia* v. *Attorney General of State of New Jersey*, 623 F.2d 307 (3d Cir.), *cert. denied*, 449 U.S. 1042, 101 S.Ct. 622, 66 L.Ed.2d 504 (1980). "While the Appellate Division did not cite to the Fourteenth Amendment in its [opinion], its 'method of analysis' was consistent and synonymous with the classic findings required for Fourteenth Amendment violations." *Id.* at 310. *Cf. Santana* v. *Fenton*, 685 F.2d 71, 74 (3d Cir.), *cert. denied*, 459 U.S. 1115, 103 S.Ct. 750, 74 L.Ed.2d 968 (1982) (no exhaustion when petitioner did not present the right-to-testify argument in constitutional terms but in terms of the trial court's abuse of judicial discretion); *Paullet* v. *Howard*, 634 F.2d 117, 119 (3d Cir.1980) (no exhaustion where prosecutor's opening remarks presented to state courts as reversible error not as a constitutional violation).

The teaching of *Bisaccia, supra*, is applicable to this case. There the court stated "[b]ecause the substance of the appellant's state claim is virtually indistinguishable from the due process allegation now before the federal court, and because the method of analysis is indistinct, the *Picard* test for exhaustion of state remedies has been met. This conclusion is especially appropriate because of the necessarily vague nature of a due process allegation. Failure to invoke the Due Process Clause more specifically should not therefore stand in the appellant's path to habeas relief, especially since the state courts understood and considered the 'substantial equivalent' of the appellant's claims before this court and the court below." *Bisaccia*, at 312.

SCOPE OF REVIEW

"It has long been established, as to constitutional issues which may properly be raised under § 2254, that even a single

federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question." *Sumner* v. *Mata*, 449 U.S.539, 543-44, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1981).

However, under 28 U.S.C. § 2254(d), a state court factual finding is entitled to a "presumption of correctness" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply. Subsection (d) reads as follows:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;

> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.
>
> And in an evidentiary hearing in the proceeding in the federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Congress enacted subsection (d) "to insure that a state finding [of fact] not be overturned merely on the basis of the usual 'preponderance of the evidence' standard." *Sumner* v. *Mata*, 449 U.S. at 552, 101 S.Ct. at 769. In order to ensure that this mandate is enforced, the Supreme Court has held that "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Id.*

An examination of the trial judge's statement indicates that he would apply the sanction of precluding petitioner's alibi witness solely because of defense counsel's untimeliness in asserting an alibi defense in violation of N.J. Court rule 3:11-1 and 3:11-2. Those rules read as follows:

> **3:11-1. Bills of Particulars; Amendment**
>
> If a defendant intends to rely in any way on an alibi, he shall, on written demand of the prosecuting attorney and within 10 days thereafter, furnish a written bill of par-

ticulars, signed by him, stating the specific place or places at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Within 10 days after receipt of such bill of particulars from the defendant, the prosecuting attorney shall, on written demand, furnish the defendant or his attorney with a written bill of particulars stating the names and addresses of the witnesses upon whom the State intends to rely to establish defendant's presence at the scene of the alleged offense. The trial court may order the amendment or amplification of such particulars, or of the time of their service, as the interest of justice requires.

3:11-2. Failure to Furnish

If such bill of particulars is not furnished as required, the court may refuse to allow the party in default to present witnesses at trial as to defendant's absence from or presence at the scene of the alleged offfense, or make such other order or grant such adjournment as the interest of justice requires.

The trial judge's finding that defense counsel submitted his notice of alibi in an untimely manner will be presumed correct under § 2254(d). However, as the Appellate Division noted, the trial judge made no findings of fact concerning whether petitioner purposefully withheld his alibi defense from the state, whether petitioner fabricated his alibi defense, whether the State was prejudiced by the untimely notice, whether the alibi witness' testimony was particularly important to petitioner's defense or merely cumulative, whether other less severe sanctions could have been reasonably imposed on petitioner or defense counsel, or whether a continuance would not have been feasible under the circumstances.

The Appellate Division's finding that the proffered testimony was of "dubious value" appears to be a determination either that the proffered testimony would not have been credible or that the testimony would have been cumulative of defendant's own testimony concerning his alibi. Even if the Appellate Division's finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and *Sumner* v. *Mata*, several excep-

tions to the presumption apply here. First, the material facts underlying the finding were not adequately developed by the trial court. 28 U.S.C. § 2254(d)(3). Second, petitioner did not receive a "full, fair, and adequate hearing" on the issue of the credibility or importance of Ms. Moore's testimony. *Id.* § 2254(d)(6). Finally, the finding is "not fairly supported by the record." *Id.* § 2254(d)(8). There is no indication in the record that Ms. Moore's testimony would not have been credible and important to petitioner. Therefore, the Appellate Division's finding that Ms. Moore's testimony would have been of "dubious value" will not be presumed correct.

The United States Supreme Court has recently stated that "[i]n the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive." *Miller* v. *Fenton*, ____ U.S. ____, ____, 106 S.Ct. 445, 451-53, 88 L.Ed.2d 405 (1986). In *Miller* the Court reversed the Third Circuit's denial of a habeas corpus petition. The Third Circuit had held that the determination of the voluntariness of petitioner's confession was a question of fact to be accorded the presumption of correctness. *Miller* v. *Fenton*, 741 F.2d 1456, 1464 (3d Cir.1984), reversed at ____ U.S. ____, 106 S.Ct. 445 (1985). The Supreme Court held that the issue was a question of law subject to "plenary federal review." ____ U.S. at ____, 106 S.Ct. at 451-53.

The Court provided guidelines to be used in determining whether an issue involves a question of law or a question of fact, stating: "At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." ____ U.S. at ____, 106 S.Ct. at 451-53. A situation which would justify extending deference to the trial court would exist if, for example, "the issue involve[d] the credibility of witnesses and therefore turne[d] largely on an evaluation of demeanor."

Id. The Court found that "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of voluntariness."

In the instant case, there is no issue concerning the legal or factual character of the state court findings. Had the state court made findings concerning the defendant's state of mind in waiving his right to present an alibi witness, the issue might have arisen. I expressly make no determination as to whether such finding would be a question of law to be presumed correct under § 2254(d) or whether the issue would be subject to plenary federal review as a matter of constitutional law.

I need not review petitioner's claims of ineffective assistance of counsel and denial of a fair trial by reference to prior arrests and probationary status, since I have decided to grant his petition for habeas relief based on the denial of his right to present witnesses in his favor.

THE MERITS

The right to present witnesses in one's defense is a fundamental right guaranteed by the Sixth Amendment and made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Chambers* v. *Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973); *Washington* v. *Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington* at 19, 87 S.Ct. at 1923.

Although the state may not prohibit the exercise of this right, it clearly may condition it on reasonable rules designed

to further legitimate state interests. The Supreme Court has recognized that the State has a legitimate interest in preventing a criminal defendant from concocting a last minute alibi, and has upheld the constitutionality of a notice of alibi statute which provides the defendant with reciprocal discovery rights. *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973); *Williams* v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893. 26 L.Ed.2d 446 (1970). It has expressly reserved, however, the question presented here—whether the enforcement of such a statute by the exclusion of testimony violates the defendant's right to compulsory process. *Wardius* v. *Oregon*, 412 U.S. At 472, n. 4, 93 S.Ct. at 2210, n. 4; *Williams* v. *Florida*, 399 U.S. at 83, n. 14, 90 S.Ct. at 1896, n. 14; *Smith* v. *Jago*, ___ U.S. ___, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985) (White dissenting from denial of petition for a writ of certiorari); *Taliaferro* v. *Maryland*, 461 U.S. 948, 103 S.Ct. 2114, 77 L.Ed.2d 1307 (1983) (same).

Federal courts faced with sixth amendment challenges to witness preclusion orders have offered varied responses. The Fifth Circuit is the only court to have found that witness preclusion orders imposed solely as sanctions to enforce discovery orders against criminal defendants *per se* violate the compulsory process clause of the sixth amendment. *United States* v. *Davis*, 639 F.2d 239, 243 (5th Cir.1981). *See also Fendler* v. *Goldsmith*, 728 F.2d 1181, 1185-87 (9th Cir.1983) (analyzing the *Davis* court's approach).

Most other courts, including the state courts of New Jersey, have applied a balancing test, holding that the government's interest in enforcing discovery rules should be balanced against the defendant's right to call witnesses in his favor. *See, e.g.*, *Fendler* v. *Goldsmith*, 728 F.2d 1181, 1187 (9th Cir.1983) (habeas petitioner entitled to relief under both the balancing approach and the *Davis* approach). *Chambers* v. *Mississippi*, 410 U.S. at 295, 93 S.Ct. at 1045 (the sixth amendment right to call and examine witnesses is "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process. . . . But its denial or significant diminu-

tion calls into question the ultimate integrity of the factfinding process and requires that the competing interest be closely examined."); *Ronson* v. *Commissioner of Cor. of State of N.Y.*, 604 F.2d 176 (2d Cir.1979) (habeas petitioner entitled to relief where he gave adequate notice of intention to use insanity defense and government was not prejudiced by technical noncompliance with discovery rule); *United States ex rel. Enoch* v. *Lane*, 581 F.Supp. 423 (N.D.Ill.1984) (habeas petitioner entitled to relief where there is no evidence that he purposefully withheld the name of a material witness and where the witness' testimony was very important to his defense); *United States ex rel. Robinson* v. *McGinnis*, 593 F.Supp. 175, 181 (C.D.Ill.1984) (where trial judge only made a limited inquiry into habeas petitioner's failure to raise an alibi defense in a timely fashion, preclusion was too severe a sanction); *Hacket* v. *Mulcahy*, 493 F.Supp. 1329, 1340 (D.N.J.1980) ("in view of highly technical nature of his counsel's error, the absence of any evidence of complicity by petitioner in that error, the lack of any prejudice to the State caused by the error, the severe prejudice to petitioner caused by the preclusion sanction by the prosecution before the jury . . ." defendant was entitled to habeas relief); *State* v. *Francis*, 128 N.J.Super. 346, 351, 320 A.2d 173 (App. Div. 1974) (adopting balancing test but finding preclusion to be harmless error).

Other circuits have only considered preclusion of alibi and alibi-rebuttal witnesses in the context of direct review of federal cases determining only whether there was an abuse of discretion and without considering sixth amendment violations. *See United States* v. *Woodward*, 671 F.2d 1097 (8th Cir.1972) (not an abuse of discretion where trial judge did not exclude government's alibi-rebuttal witness where government failed to disclose names of rebuttal witnesses in discovery); *United States* v. *White*, 583 F.2d 899 (6th Cir.1978) (not an abuse of discretion where trial judge precluded defendant from presenting alibi witness after defendant rested his case where trial judge found that defendant deliberately disregarded the discovery rule); *United States* v. *Fitts*, 576 F.2d 837 (10th

Cir.1978) (although better practice would have allowed defendant to present alibi testimony, wording and history of Federal Rule of Criminal Procedure 12.1 contemplated such exclusion and trial judge did not abuse his discretion); *United States* v. *Barron*, 575 F.2d 752 (9th Cir.1978) (not an abuse of discretion for trial judge to preclude alibi witness where government served discovery request eleven days before trial and defendant's response came two days late).

I find that the balancing test is the correct standard to be applied in reviewing a habeas petition where the state court imposed a witness preclusion sanction to enforce the state's notice of alibi rule. Therefore, I will follow the standard applied in *Fendler, supra*. The weight of authority and a proper consideration of state interests supports the balancing test. *See, e.g.*, *Hackett* v. *Mulcahy*, 493 F.Supp. 1329, 1340 (D.N.J.1980) (applying a balancing approach). An absolute prohibition of using the witness preclusion sanction to enforce notice of alibi rules is unnecessary. Such a prohibition could result in making trial courts powerless to prevent criminal defendants from concocting last minute alibis. A habeas court can take all factors into account by employing a balancing test.

I turn now to the question of whether the State's interests in enforcing its discovery rule outweight petitioner's sixth amendment right to call witnesses in his favor. As stated previously, the state courts made no findings of fact which address this issue and to which I could defer. Thus, an independent search of the record must be made.

I find that the testimony of an alibi witness would have strengthened petitioner's case. Ms. Moore's testimony would have been neither cumulative of other evidence nor a waste of time. By definition, if a jury finds the testimony of an alibi witness to be credible and believes a defendant was elsewhere when the crime occurred, it will acquit the defendant. The fact that the jury took two and one-half days to reach a verdict also indicates that the testimony of an alibi witness may have created reasonable doubt.

Furthermore, there is no evidence that defendant purposefully withheld Ms. Moore's name from the State. Based on the record, it appears that the petitioner did tell his attorney about Ms. Moore. However, "[e]ven wilful noncompliance by an attorney which may not be attributed to the client does not constitute waiver [of sixth amendment rights]." *Hackett* v. *Mulcahy*, 493 F.Supp. 1329, 1336 (D.N.J.1980).

In addition, the State did not show what prejudice, if any, it would have suffered. To the contrary, the prosecutor had already interviewed Ms. Moore prior to trial. If the State had required a continuance to prevent prejudice, this alternative could have been pursued. The trial judge's offer of a continuance for defense counsel to research newly acquired discovery shows that such an alternative was indeed feasible.

I find that where the witness could have strengthened petitioner's case, where the state has not shown that defendant purposefully withheld notice of his witness, and where the state showed no prejudice in allowing the witness to testify, the trial court committed constitutional error in imposing the witness preclusion sanction. Under the circumstances in this case, therefore, the record as a whole shows that the petitioner's sixth amendment right to call witnesses in his favor outweighed the state's interest in enforcing its discovery rules and that the state court's preclusion of petitioner's alibi witness justified only by the untimely response of defense counsel to the state's discovery request denied petitioner fundamental rights and due process of law.

HARMLESS ERROR TEST

Because the trial court's error affected substantial constitutional rights, I must determine whether the error was "harmless beyond a reasonable doubt." *See, e.g., Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Third Circuit recently reviewed the *Chapman* standard in *Holland* v. *Attorney General of New Jersey*, slip op. November 22, 1985. There the court stated:

> it is now established law that erroneous admission of evidence, even evidence admitted in violation of a constitutional right, is not automatically reversible error. In *Chapman* v. *California*, . . . the court held that federal constitutional errors which are harmless beyond a reasonable doubt do not require reversal, but that the beneficiary of the error, the state, bears the burden of proving harmlessness. *Id.* at 23-24 [87 S.Ct. at 827-28]. In *Chapman*, the inquiry into harmlessness was articulated as "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 [87 S.Ct. at 827] (*quoting Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 [84 S.Ct. 229, 230, 11 L.Ed.2d 171] (1963).)
>
> Whether the alleged constitutional error was harmless is a question of federal law. *Rushen* v. *Spain*, 464 U.S. 114, 120 [104 S.Ct. 453, 456-57, 78 L.Ed.2d 267] (1983). This frequently requires that the federal habeas court review the untainted evidence. . . . Slip op. at 12-13.

In reviewing the evidence, "the court must assess the 'probable impact of the [error] on the minds of an average jury.'" *Allison* v. *Gray*, 603 F.2d 633, 634 (7th Cir. 1979) (quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828 (1969)).

The Appellate Division, in reviewing this case, stated regarding the notice of alibi issue:

> . . . if error was committed in this respect we are satisfied that it was harmless. Not only was the nature of the proposed alibi testimony such as to have been of dubious value, but the evidence presented by the state . . . overwhelmingly established defendant's guilt. Thus, even if a constitutional error involving defendant's sixth amendment right occurred, a reversal would not be mandated since we are satisfied beyond a reasonable doubt that any such error did not affect the verdict. *State* v. *Macon*, 57 N.J. 325, 340 [273 A.2d 1] (1971).

I disagree with this assessment of the harmless nature of the error.

By definition, if a jury finds the testimony of an alibi witness to be credible and believes a defendant was elswhere when the

crime occurred, it will acquit the defendant. Obviously the erroneous exclusion of such testimony could affect the verdict. In this case, the only testimony presented in support of defendant's alibi defense was by the defendant himself. I cannot find beyond a reasonable doubt that corroborating alibi testimony would not have affected the verdict.

The harm was further aggravated when the trial court allowed the state to cross examine the petitioner about his lack of alibi witnesses and subsequently allowed the state to comment upon the absence of alibi witnesses to the jury.

In cross-examining Braunskill, the prosecutor questioned him as follows regarding his whereabouts at the time the crime occurred:

> Q: And all these people saw you there at the Sixty-five Club that evening. Isn't that correct?
>
> A: Yes, yes.
>
> Q: And since June 12, have you spoken to any of these people?
>
> A: Yes, I have tried to get them to come to court, yes.
>
> Q: But none of them are coming to court. Isn't that correct?
>
> A: From what I can see, yes, they haven't been.
>
> Q: And did you tell your attorney to get them?
>
> A: Yes, I told him, but he told me they would be no good to me if they're not willing to come on their own. Trial Transcript, 1/27/81, 115-20 to 116-6.

In his summation, the prosecutor made the following statements in spite of an objection by defense counsel and a warning by the trial judge that he was in "a very potentially dangerous zone:"

> And if that wasn't enough, there's even more, more absurdity to his whole story. He said he was at several bars and saw many friends of his. As a matter of fact, two of his

> friends who he name from the witness stand had given him a ride, that ride to the Halftime Emporium, and these people, all these people, maybe fifty, sixty, seventy people in all these places, could verify, could corroborate his story. . . . He said he wasn't going to force them to come in. Is that believable? Is that credible? Trial Transcript, 1/28/81, 35-25 to 37-13.

Furthermore, the state's evidence does not overwhelmingly demonstrate petitioner's guilt so as to support a finding that the error was harmless. The victim herself was unable to identify the petitioner from photographs while the incident was fresh in her mind. Admittedly the two witnesses did select his photograph. However, they did so based on viewing the assailant for a matter of seconds, and they are shown only six photographs. "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States* v. *Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1932-33, 18 L.Ed.2d 1149 (1967); *State in the Interest of W.C.*, 85 N.J. 218, 224, 426 A.2d 50 (1981). With regard to photographic identification, the United States Supreme Court has recognized:

> A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification.

Simmons v. *United States*, 390 U.S. 377, 381, 383-84, 88 S.Ct. 967, 969, 970-971, 19 L.Ed.2d 1247 (1968).

The Third Circuit has recently analyzed the reliability of eyewitness testimony in approving the use of experts in the field of human perception and memory. Such experts may properly testify to the reliability of eyewitness identification

and satisfy the helpfulness standard of Fed.R.Evid. 702. The court listed numerous factors which it found could affect the reliability of eyewitness testimony. They are as follows:

> (1) the "forgetting curve," i.e. the fact that memory does not diminish at a uniform rate;
>
> (2) the fact that contrary to common understanding, stress causes inaccuracy of perception and distorts one's subsequent recall;
>
> (3) the "assimilation factor," which indicates that witnesses frequently incorporate into their identifications inaccurate information gathered after the event and confused with the event;
>
> (4) the "feedback factor," which indicates that where identification witnesses discuss the case with each other they can unconsciously reinforce their individual identifications; and
>
> (5) the fact that studies demonstrate the absence of a relationship between the confidence a witness has in his or her identification and the actual accuracy of that identification. *United States* v. *Downing*, 753 F.2d 1224 (3d Cir.1985).

The court also recognized other variables approved by the Sixth Circuit:

> (1) that a witness who does not identify the defendant in a first line-up may 'unconsciously transfer' his visualization of the defendant to a second line-up and thereby incorrectly identify the defendant the second time;
>
> (2) that studies demonstrate the inherent unreliability of cross-racial identifications; and
>
> (3) that an encounter during a stressful situation decreases the eyewitness' ability to perceive and remember and decreases the probability of an accurate identification. *Id.* at 1231.

Some of these factors support my finding that the state's properly adduced evidence was not overwhelming and that the evidence was incapable of overcoming the erroneous preclusion of petitioner's alibi witness.

Based upon the non-cumulative nature of the evidence, the fact that an alibi witness would have provided a more solid basis for the defense theory of the case, the fact that the jury in petitioner's trial took two and one-half days to deliberate over the evidence without the alibi witness and the fact that the state's properly adduced evidence was not overwhelming, I cannot conclude beyond a reasonable doubt that the state court's error was harmless.

I realize that two highly respected judges reached an opposite conclusion in affirming petitioner's conviction. As this opinion demonstrates, I plainly disagree with that panel's conclusion.

Petitioner was tried before a very able judge whose reputation needs no embellishment by this court. However, the trial court's refusal to permit the petitioner to introduce alibi testimony crucial to his case "visited a terrible punishment on a party [guilty of a] minor transgression of the rules. . . . He was deprived of the right to defend himself. The prosecutor's conduct in using the defense which the jury was not permitted to hear to undermine the credibility of the defense which they did hear was grossly unfair." *Hackett* v. *Mulcahy*, 493 F.Supp. 1329, 1340 (D.N.J.1980).

In granting the relief sought, this court is not unmindful of the egregious nature of the offense committed on an old woman. However, to countenance this constitutional transgression would undermine that palladium of our liberties, the Constitution, and the jewel in that document, the Bill of Rights.

Although this court has the authority to unconditionally order petitioner's enlargement, *see United States ex rel. Thomas* v. *New Jesey*, 472 F.2d 735, 742 (3d Cir.1973), I will give the state a reasonable time in which to retry petitioner. A writ of habeas corpus shall issue unless within 30 days the State of New Jersey shall afford petitioner a new trial.

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5204.

DANA BRAUNSKILL,

v.

GARY HILTON, Warden
and State of New Jersey
W. Carv Edwards, Attorney General
of the State of New Jersey, et al.

Appellants

On Appeal From The United States District Court
For The District Of New Jersey (Newark)
Civil No. 85-2008.
Argued October 27, 1986
Before: ADAMS, HIGGINBOTHAM, and GARTH, *Circuit Judges*
(Filed December 2, 1986)

OPINION OF THE COURT

PER CURIAM

This is an appeal from an order of the district court granting a petition for a writ of habeas corpus by a state prisoner who was incarcerated as a result of being convicted on two felony counts.

I.

Dana Braunskill was arrested for a sexual assault on an elderly woman. The attack occurred after midnight on June 12,

1981 in an apartment building lobby in Bloomfield, New Jersey. It was partially witnessed by two other residents of the apartment complex, and these residents, and the victim, Jane Lyons, summoned the police.

One witness, Josette Amabile, stated initially that she had failed to get a "good look" at the assailant because she was in the apartment house elevator before she realized what was happening; she related that she saw a black youth sitting or squatting and an elderly white woman on her knees in front of him. She later asserted that she had made eye contact with the assailant for 5 to 10 seconds, at which point the assailant had covered his face and groaned. She was shown a photo array of six photographs, and identified Braunskill's photograph as that of the assailant. The other witness, Joseph Scherer, had tried unsuccessfully to chase away the assailant, and had had a full view of him. He too was shown a photo array of six photographs, and selected Braunskill's picture. The victim was unable to see the assailant's face, but gave a general description (moderate-sized black youth in dark clothes, a jacket, and tennis shoes); she was unable the following evening to identify her assailant from the photo array. At trial, the victim testified that she believed that the defendant was her assailant.

Braunskill testified in his own defense, giving a detailed description of his wanderings on the night in question. His account seems to strain logic at points, but we cannot say that no rational jury could credit it. The most important element of defendant's attempted explanation of his whereabouts is the assertion that he arrived at the apartment of his girlfriend, Florine Moore, some distance from the scene of the attack, shortly before the time the attack occurred, and that he remained there for the rest of the evening. That testimony, along with some inuendo of a vendetta against Braunskill by a few individual police officers, and attacks on the credibility and accuracy of the eyewitnesses, constituted the whole of Braunskill's defense.

Defendant's counsel had intended to call Florine Moore as an alibi witness to confirm that Braunskill had been at her apart-

ment throughout the time of the assault. New Jersey Court Rule 3:11-1 requires the timely filing of a notice by the defendant of alibi, and that the defendant provide the name and address of any alibi witness. Braunskill's attorney served the appropriate written notice, but did so out of time. Rule 3:11-2 stipulates that in the event of a violation of Rule 3:11-1, "the court may refuse to allow the party in default to present [alibi witnesses] . . ., or make such other order or grant such adjournment as the interest of justice requires."

Prior to the impaneling of the jury, Braunskill's trial attorney asked permission to put Moore on the stand at trial, notwithstanding his failure to file a timely notice of an alibi defense. This request was opposed by the prosecutor who claimed unfair surprise because of the defendant's failure to comply with Rule 3:11-1. It emerged, however, that Braunskill's lawyer had notified the prosecutor by phone of his intention to call Moore approximately two weeks earlier, that he had formally notified the prosecutor in writing the previous week, that this had provided the prosecutor with sufficient time not only to interview Moore but to find and talk with the individual with whom she was speaking on the phone when Braunskill allegedly arrived at her apartment, that this was in fact more than Braunskill's attorney himself had done, and that the prosecutor was himself prepared to call both Moore and her telephone companion if he deemed it necessary.

Braunskill's counsel explained that his failure to file timely notice was a consequence of the fact that he wished to speak with Moore before deciding to employ her as an alibi witness, and that he had failed to contact Moore for several months, apparently because he left it entirely to Braunskill himself to track her down (Braunskill and Moore had parted company following Braunskill's arrest). The trial judge ruled that because of the failure of Braunskill's counsel to file a timely notice of alibi testimony, he would not allow Moore to testify.

The presentation of all the evidence consumed less than a full day of trial. During cross-examination and in his closing state-

ment, the prosecutor alluded to the fact that there were no witnesses in the courtroom to substantiate Braunskill's alibi defense. The jury began deliberations just before noon of the following day; at 3:15 p.m. they requested a rereading of the testimony of both Braunskill and one of the two eyewitnesses. Shortly after noon on the second day of deliberations the jury asked the judge a further question concerning the testimony of the same eyewitness, and then at 2:20 p.m. reported that they were unable to reach a unanimous verdict. The judge instructed them to continue deliberating. At 3:10 p.m. on the third day of deliberations, the jury reached a verdict of guilty of sexual assault and unlawful possession of a knife. Braunskill was sentenced on March 26, 1981 to eight years imprisonment, with a minimum term of four years.

An appeal was taken to the Superior Court of New Jersey, Appellate Division, on May 11, 1981. On the appeal, Braunskill raised as the first of several points that the trial judge's ruling on the alibi-notice question "constituted an abuse of discretion and violated defendant's sixth amendment right to present witnesses in his defense." (Appendix at 303) The Appellate Division affirmed Braunskill's conviction, and stated that "because of the cursory manner in which the trial judge disposed of the issue without stating any of his reasons for excluding alibi witnesses, we are unable to determine whether that exclusion constituted an abuse of judicial discretion." (App. at 372) The appeals court noted that the trial judge had ignored state decisional law directing him to resolve whether the State would have been unfairly surprised and, if so, whether that surprise could be redressed by the grant of a reasonable continuance. (*Id.*) The court observed that, in contrast, on the separate issue of the State's improper withholding of discovery material from Braunskill, the trial court had been willing to grant a continuance rather than sanction the prosecution. (App. at 373) The Appellate Division held, however, that "if error was committed in this respect," it was harmless. (*Id.*) The court stated that the alibi testimony would have been "of dubious value," although it gave no indication why it believed

this to be so. (*Id.*) The Court also found the other trial errors to be harmless.

Braunskill then sought a writ of review in the New Jersey Supreme Court, which was denied on March 2, 1983. (App. 380) In 1985, Braunskill filed a petition *pro se* in the United States District Court for the District of New Jersey for a writ of habeas corpus, on the grounds of deprivation of his right to call witnesses in his defense and of ineffective assistance of counsel constituted a violation of his sixth amendment rights. (App. 386-87) In its answer, the State opposed the writ on four grounds: that Braunskill had failed to exhaust state remedies because he had not sought post-conviction relief (App. 426-27); (2) that Braunskill had not "fairly presented" the sixth amendment/alibi witness issue to the state courts, as required, because he had devoted more time in his brief in the Appellate Division to the state law discretion issue than to the federal constitutional issue, and because the Appellate Division in its opinion did likewise (App. 428); (3) that Braunskill's complaint was not cognizable on habeas because it concerned only state law (App. 429-30); and (4) that since Braunskill had not exhausted all his claims (i.e., the sixth amendment compulsory process claim), he could not raise his other contentions on habeas (App. 430). The State did not raise in the district court the issue of procedural default necessitating a showing of "cause and prejudice" under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

On February 27, 1986, Judge Ackerman, granted Braunskill's petition. He found that Braunskill had exhausted his state remedies, because "once a claim has been directly appealed to the state's highest court, it will be considered exhausted even if no post conviction relief is sought." (App. 444) (citing *Jones* v. *Superintendant of Rahway State Prison*, 725 F.2d 40, 41-42 (3d Cir. 1984); *United States ex rel Hickey* v. *Jeffes*, 571 F.2d 762, 754 (3d Cir. 1978); *United States ex rel Schultz* v. *Brierley*, 449 F.2d 1286 (3d Cir. 1971); *Morrison* v. *Kimmelman*, 579 F. Supp. 796, 861 (D.N.J. 1984)). He also

found that the defendant had indeed "fairly presented" his contentions to the state courts.

Reaching the merits, Judge Ackerman ruled that while the sixth amendment guarantees the right to call witnesses in one's own defense, a state may impose reasonable conditions on the exercise of that right. He further held that a balancing approach to, rather than a *per se* prohibition of, exclusion of alibi witnesses is therefore appropriate. Addressing this balancing, Judge Ackerman determined that an alibi witness would have strengthened Braunskill's case and created reasonable doubt; that there was no evidence that Braunskill himself withheld the alibi information from the court or prosecution; and that the State had not shown any prejudice. He therefore concluded that the defendant's constitutional rights had been violated at trial. Judge Ackerman found that the error was not harmless beyond a reasonable doubt, and thus ordered that writ issue unless the state retried Braunskill within 30 days.

The State appealed to this Court, and unsuccessfully sought a stay of Braunskill's release pending appeal. A panel of this Court denied the stay, and the entire Court then denied a petition for rehearing *in banc*. The issue of the stay of Braunskill's release on habeas pending appeal and retrial is now before the Supreme Court on a writ of certiorari. Before us now is the question whether the district court erred in granting the writ of habeas corpus.

II.

In *Wainwright* v. *Sykes*, *supra*, the Supreme Court reached its latest resolution of the thorny question whether state procedural rules stand on the same footing as state substantive law in establishing an independent and adequate state ground for a judgment, thus precluding federal review pursuant to a petition for habeas corpus. *Sykes* broadened the circumstances in which default under state procedure would constitute such a bar to federal review. The Supreme Court explicitly rejected the "sweeping language" of *Fay* v. *Noia*, 372 U.S. 391 (1963),

"which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention." Instead, the Court adopted "the rule of *Francis* v. *Henderson*," 425 U.S. 536 (1976), "barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver." *Sykes*, 433 U.S. at 87.

The Supreme Court has held, however, that when a state has failed to raise the *Sykes* objection to preclude review of a habeas claim in the district court, the Court will not take cognizance of the issue on appeal. *See Estelle* v. *Smith*, 451 U.S. 454, 468 n.12 (1981); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980). In *Jenkins*, the Court explained that the Supreme Court was not the proper forum in which to raise initially a *Sykes* claim, because the issue could turn on questions of state law or questions of fact, either of which is better addressed first in the district court. This rationale would seem to apply as well, if with a bit less force, to the courts of appeals. And in any case, both *Smith* and *Jenkins* make clear that *Sykes* requirements are not jurisdictional, so that a reviewing court need not consider the issue when it is not properly raised by the prosecution. Moreover, in *Engle* v. *Isaac*, 456 U.S. 107, 124 n.26 (1982), where the state had failed to present the *Sykes* issue to the district court but the district court addressed it nonetheless, as did the court of appeals, the Supreme Court also considered the issue, over the petitioner's objections. The Court held that the petitioner should have raised in the district court or the court of appeals the state's "waiver" of its *Sykes* claim.

The net effect of these cases is that the prosecution may forfeit its right to raise a *Sykes* procedural default issue on appeal by failing to press it in the district court, *Barrera* v. *Young*, 794 F.2d 1264, 1268 (7th Cir. 1986); *Boykins* v. *Wainwright*, 737 F.2d 1539, 1545 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1775 (1985); *Washington* v. *Watkins*, 655 F.2d 1346, 1368 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982), although a habeas petitioner may also forfeit his right to raise in turn the

state's "waiver" by failing to object to a later attempt to resurrect the issue. Consequently, Braunskill properly objects here to our addressing the *Sykes* issue because it was not raised below and was not considered by the district court.

Moreover, even if Braunskill's "default" in this case were the kind of "procedural default" that would bar review on habeas absent "cause and prejudice"—a proposition which we do not address—it is settled law that if the state courts themselves allowed review of the defendant's claim, then a federal court is free to address it as well. *United States* v. *Frady*, 456 U.S. 152, 166 n. 15 (1982); *Engle* v. *Isaac*, 456 U.S. 107, 136 n.44 (1982); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Lefkowitz* v. *Newsome*, 420 U.S. 283, 292 n.9 (1975); C. Wright, *Law of Federal Courts* § 53, p. 343 (4th Ed. 1983). The New Jersey Appellate Division clearly was presented with the constitutionality of the exclusion of Braunskill's alibi witness. Braunskill therefore is not precluded under *Sykes* from raising the issue on habeas.

We note, however, that Braunskill's claim here is a strong one even under the "cause-and-prejudice" standard. Unlike the merely "technical" prejudice against which the Supreme Court has been most on guard, Braunskill alleges a deprivation that goes to the very reliability of the "truth-seeking" process itself and which substantively prejudiced his defense: namely, that he could not have been Lyon's assailant because he was at Moore's apartment at the time of the crime. The strongest available corroborative evidence of this alibi was foreclosed on a narrow and draconian technical ruling questionable even as a matter of state law.[1] Braunskill here seeks to vindicate a cen-

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[1] The Appellate Division of the New Jersey Superior Court determined that "the [trial] judge did not follow the direction of State v. Francis . . . since he failed to resolve the question of whether the state would have been unfairly surprised and, if so, whether that disadvantage might have been redressed by a reasonable continuance." 128 N.J. Super. 346. *See also State* v. *Volpone*, 150 N.J. Super. 524, 530 (App. Div. 1977), aff'd 75 N.J. 543 (1977). ("Before invoking the ultimate sanction of barring a witness, the court should explore alternatives.").

tral, substantive right in the face of a technical ruling—the exact opposite of the exaltation of form over substance against which the *Sykes* "prejudice" standard is a reaction.

Similarly, the "cause" requirement of *Sykes* is designed to keep defendants and their lawyers from "sandbagging" the prosecution in state court, calculating that they might do better to raise an issue for the first time in federal court. *Sykes*, 433 U.S. at 89, 90. Where the default is not the result of a defendant's own connivance or the conscious decision (no matter how misguided) of a defendant or his counsel to "default," the "cause" barrier does not bar consideration of the claim. Such is the case here. Although defense counsel may have been inartful in failing to comply with the alibi rule, there is no evidence that his was a tactical decision, or a calculation on the defendant's part to try to disadvantage the government, nor that the "default" involved the contemplation of saving an "ace in the hole" for later litigation.

III.

When error of constitutional dimension attaints a trial proceeding, the Supreme Court has declared that it is our task on review to determine whether the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963). Whether the constitutional error was harmless is a question of federal law. *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983); *Holland* v. *Attorney General of New Jersey*, ____ F.2d ____ (3d Cir. 1985).

With this admonition as a guide, we conclude that Judge Ackerman did not err in holding that the preclusion of the alibi witness in this case was not harmless error. Braunskill's entire defense was based upon his alibi, and Florine Moore was not simply the primary, but the only, source of corroboration. Had the jury believed Moore's testimony, they perforce would have acquitted Braunskill. Without an alibi defense, the defendant had essentially no defense. The corroborating witness was to be the keystone of Braunskill's position. Indeed, the prosecutor used the absence of corroborating witnesses as a point of attack

both during the trial and in his summation. Braunskill's own testimony, while at points confusing and susceptible of an unfavorable reading, can, contrary to the State's assertion, be read to support his alibi claim; this makes Moore's potentially corroborating testimony as to the crucial fact concerning his whereabouts all the more pivotal. The jury considered this a close and difficult case, first reporting itself unable to reach a verdict, and finally taking three days to reach a verdict after a one-and-a-half day trial. The jury asked that Braunskill's own version of the events on the night in question be reread to them, and twice asked questions concerning the eyewitness testimony. Given this, we cannot say beyond a reasonable doubt that the jury would not have acquitted Braunskill had the alibi witness been allowed to testify.

This is neither any easy case nor a pleasant conclusion, but we believe the result to be mandated by the law as established for reviewing courts in *Chapman, supra*, and *Fahy, supra*. As we have observed before,

> [w]hile the error may not have contributed to petitioner's conviction, this Court is simply unable to conclude, on the basis of an independent examination of the record, that "there is [not] a reasonable possibility that [it] might have contributed to the conviction," and this is the test mandated by the Supreme Court in Fahy v. Connecticut. . . . Frequently, appellate courts are called upon, in performing an appropriate reviewing function, to determine whether any error that has been committed may be adjudged "harmless." So often, this is an assignment not free from deep concern. But because it is required, we must resolutely and objectively discharge it, whatever our own predilections may be.

United States ex rel. Macon v. *Yeager*, 476 F.2d 613, 617 (3d Cir. 1973).

V.

For the reasons stated, the judgment of the district court will be affirmed.